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CANADA LABOUR RELATIONS BOARD

A Study Paper

Prepared for the

Law Reform Commission of Canada

by

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Notice

This study describes an important part of the federal administrative process. In the course of this description the author identifies a number of problems and suggests solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the author, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

Comments on these studies are welcome and should be sent to:

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Introduction

This study is a description of the Canada Labour Relations Board and an analysis of its procedure. It was conducted and prepared during the summer of 1978.

It begins with a description of the Board's jurisdiction. The Board's powers are contained entirely in the *Canada Labour Code* and are limited to those employers whose regulation falls within the legislative power of Parliament. The second Chapter considers the composition of the Board — who its members are and what support staff the Board has. Chapter Three is a consideration of the Board's procedure — how the Board processes applications, from the time the application is filed to the time the decision is rendered to the parties.

Chapter Four discusses the need for and costs of judicial review. During the course of the study, Parliament enacted amendments to the *Canada Labour Code* which *inter alia* placed the Canada Labour Relations Board in a unique position among federal administrative tribunals by restricting access to judicial review of the Board's decisions to narrow grounds. The merits of these changes are discussed, as well as the merits of further restricting judicial review.

Chapter Five is entitled Accountability. It is an attempt to describe the relationship of the Board to Parliament, the Department of Labour, the media and the public.

The scope of the study does not permit an analysis of the extensive jurisprudence developed by the Board in interpreting and applying the provisions of Part V of the *Code*. However, one area of Board decision-making is discussed in Chapter Six. This concerns disputes about whether a proposed bargaining unit is "appropriate" within the meaning of the *Code*. The Board's jurisprudence illustrates a consideration of conflicting legislative policies and the application of certain policy choices.

Finally, there is a summary of recommendations made in other parts of the study.

The Board seeks to achieve several goals. In carrying out its statutory mandate in a manner consistent with the objects of Part V, it must be thorough in the sense that it must have before it in making a decision all relevant facts and an understanding of the legal context. At the same time, the volatile nature of labour relations dictates that applications be processed expeditiously and that decisions be made and communicated to the parties promptly. This paper's assessment of the Board's procedure and proposals for change are premised on those goals.

The Canada Labour Relations Board is unusual among federal administrative tribunals in that it has counterparts in all ten provinces which to varying degrees perform similar functions within the provincial legislative sphere. Four of these tribunals, in Nova Scotia, Quebec, Ontario and British Columbia were visited in the course of the study and many valuable ideas emanated from them. However, it should be recognized that the Canada Labour Relations Board faces challenges not shared by the provincial boards and that the federal context does not permit the wholesale importation of procedures which have proved successful in provincial jurisdiction. In the first place, the distances to be covered by the Board's officers and members are enormous — applications come from all ten provinces and both territories. (In the Yukon and Northwest Territories, the Board's jurisdiction is entire.) The time taken to travel to the Board's clients is considerable. Secondly, the Board naturally operates in both official languages. This taxes the resources of the Board in several ways. For example, the Board's Executive (the Chairman, Vice-Chairmen and members) come from all parts of Canada. Not all of them are sufficiently bilingual to sit on hearings in both official languages. Therefore, the place of the hearing and the language of the parties often place a preliminary restriction on the range of persons able to sit and hear the case. Translation is also a time-consuming function.

This study would have been much more difficult without the utmost cooperation of the Canada Labour Relations Board. This cooperation was received from all parts of the Board. The Board was able to provide to the author and research assistant office space at the Board's headquarters. This facilitated our becoming familiar with the Board's personnel and procedures. Moreover, we were given access to all Board files, invited to *in camera* meetings, and advised of developments which the Board felt would be of interest to us.

I also wish to acknowledge the very able assistance of Lisbeth Jones who at the time was a law student at McGill University. The work she did as a research assistant is very much appreciated. Moreover, many people at the Nova Scotia Labour Relations Board, Quebec's Tribunal du Travail, the Ontario Labour Relations Board and the British Columbia Labour Relations Board gave freely of their time.

CHAPTER ONE

The Jurisdiction of the Canada Labour Relations Board

I. HISTORY

The Government of Canada's recognition of the public interest in labour relations is expressed in the preamble to Part V of the *Canada Labour Code*[1] in the following words:

> . . .the Parliament of Canada desires to continue and extend its support to labour and management in their co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada. . . .

Labour relations legislation attempts to provide for the settling or adjudication of issues without resort to the courts. The enactment of a legal regime to govern the major aspects of labour relations creates the need for a body to administer the provisions of the regime.[2] The Canada Labour Relations Board was created to administer the provisions of Part V of the *Canada Labour Code*.[3] It is entirely a creature of statute: the extent of its jurisdiction is set forth in the *Code*.

The history of federal administration of labour relations legislation is one of vesting of increasing power and autonomy in a specialized body[4] which functions independently of the Ministry of Labour.[5]

As the extent of federal regulation of labour relations has continued to increase,[6] so the jurisdiction of the Canada Labour Relations Board has broadened and powers of intervention and compulsion have been created, or removed from the courts of common law, and vested in the Board.[7] In the area of collective bargaining, federal legislation has been concerned with broad areas of interest: intervention in the

bargaining process through compulsory conciliation and, of greater importance, the granting of legal recognition to the bargaining relationship and the establishment of the structure of this relationship.[8] The Canada Labour Relations Board exercises jurisdiction over the second of these policy concerns. Conciliation has remained almost exclusively the responsibility of the Ministry of Labour.[9]

II. RESTRICTIONS UPON THE JURISDICTION OF THE CANADA LABOUR RELATIONS BOARD

There are two types of restriction on the Board's jurisdiction. The division of legislative power under the *British North America Act* limits the Board to areas within federal legislative competence.[10] Secondly, the Board's powers are limited to those conferred on it by the *Canada Labour Code*.

A. CONSTITUTIONAL JURISDICTION OF THE BOARD

1. Historical Perspective

In the decades immediately following Confederation, the federal government was the dominant partner in emerging Canadian federalism.[11] Within this context, it was assumed that the passage of the *Industrial Disputes Investigation Act*[12] in 1907 was a valid exercise of residual authority under the federal peace, order and good government power in the *B.N.A. Act*.[13] (This assumption was probably quite warranted given the decision in *Citizens' Insurance Co. v. Parsons*[14] where this approach was used to establish federal power to incorporate a company.) It is evident from the description in the *Industrial Disputes Investigation Act* of the intended scope of operation of the legislation that the federal government conceived of its role in labour relations as a function of its concern with the national interest. Paragraph 2(*c*) of the Act brought within the ambit of the Act such matters as transportation, communications, mining property and public service utilities. However, the federal government did not perceive its jurisdiction over labour relations as exclusive, for the legislation granted persons

the option in some cases of presenting their dispute to either the federal or a provincial board.[15]

In 1925 federal competence in the area of labour relations was challenged in *Toronto Electric Commissioners v. Snider*.[16] The Privy Council, focussing on the private and contractual nature of employment, determined that labour relations was a "matter" that fell within subsection 92(13) of the *B.N.A. Act*[17] relating to "Property and Civil Rights in the Province" and that primary jurisdiction over labour relations lay with the provinces. In so holding, the Privy Council rejected the view expressed by the majority of judges in the lower courts that the existence of industrial peace was a matter relating to the "Peace, Order and good Government of Canada",[18] and thus within federal jurisdiction. This decision put an end to federal dominance in the field of labour relations, except in times of national emergency.[19]

In response to the view adopted by the Privy Council in *Snider*, section 2 of the *Industrial Disputes Investigation Act*[20] was amended to limit the disputes to which the Act might apply to those ". . .in relation to employment upon or in connection with any work, undertaking or business which is within the legislative authority of the Parliament of Canada. . .".[21] These provisions have been substantially retained in all subsequent federal legislation.[22] The focus of federal legislation is the specific heads of federal competence in section 91 of the *B.N.A. Act* rather than those sectors of the economy which are of national interest.[23]

The Supreme Court of Canada in the reference *In The Matter of Legislative Jurisdiction over Hours of Labour*,[24] while affirming the basic division of jurisdiction over labour relations set out in *Snider*,[25] held that employees involved in federal government operations and Crown enterprises and in those areas over which the federal government possessed legislative jurisdiction fell under federal jurisdiction in the field of labour relations. In effect the area of labour relations was to be a field of concurrent jurisdiction in which,

> . . .the division of authority between Parliament and the provincial legislatures is based on an initial conclusion that insofar as such relations have an independent constitutional value they are within provincial competence; and, secondly, insofar as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise.[26]

Despite these strong pronouncements in the early development of the law in this area, this division of jurisdiction did not remain

unchallenged. The notion of a federal presence deriving from legislative competence over specific areas was directly challenged in *Re the Validity of the Industrial Disputes Investigations Act* (the *Stevedoring Reference*).[27] The Supreme Court of Canada again upheld the approach mandated by *Snider*.[28] Labour relations were held to be such a vital part of a commercial or industrial undertaking that once it was established that an activity was within federal jurisdiction, then regulation of its labour relations came within federal control.

The principles have remained unchanged since these decisions. The subject of labour relations is presumptively a matter of provincial jurisdiction. Federal jurisdiction is confined to those instances where the undertaking concerned comes within a specifically enumerated federal head of power under section 91 of the *B.N.A. Act*, is brought within federal authority by a declaration under paragraph 92(10)(*c*) of the Act, is connected with federal government operations or federal Crown enterprises, falls under federal general or residuary powers, or is brought within federal control during a time of war or other emergency. Later decisions have conclusively determined that labour relations is an area of concurrent jurisdiction.[29] While some commentators have pointed to the illogic of having employees in a federally controlled enterprise covered exclusively by federal laws,[30] this complete separation of jurisdiction remains.

2. Federal Legislative Jurisdiction over Labour Relations

Since the initial descriptions of principle of federal authority in the matter of labour relations, the courts have proceeded to elaborate the scope of federal jurisdiction in relation to the specific heads under section 91. Broadly speaking, federal regulatory control is exercised over matters specifically enumerated in section 91, those so included by virtue of a declaration under paragraphs 92(10)(*c*), those excluded from provincial jurisdiction under paragraphs 92(10)(*a*) and (*b*), matters held to be within the federal residuary power, and finally, a federal government operation or federal Crown enterprise.[31]

Judicial construction of sections 91 and 92 of the *British North America Act*[32] has upheld federal jurisdiction over Navigation and Shipping[33] but excluded employees engaged in wholly intra-provincial shipping from the scope of federal authority.[34] The exceptions of subsection 92(10) have been treated as incorporated into the enumerated heads of subsection 91, because subsection 91(29) expressly so provides; this brings within federal jurisdiction the principal media of

transportation and communications insofar as they are extraprovincial or are designated as federal works or undertakings under the declaratory power.[35] The touchstone for federal jurisdiction in these areas is the presence of a degree of inter-provinciality in the enterprise in question. Once the enterprise has been established as a unified undertaking,[36] the whole of that undertaking becomes subject to federal jurisdiction. The courts will not sever the inter-provincial aspect of an enterprise from its intra-provincial aspects, provided that the arrangement is not a mere subterfuge to avoid provincial control.[37] In dealing with transportation by road, the courts have held that the proportion of the operation which is inter-provincial is generally not material.[38]

Inter-provincial extension also forms the basis for federal jurisdiction over inter-provincial and international pipelines and powerlines, the exportation of power and gas and the importation of gas.[39] Federal jurisdiction has further been extended by virtue of declarations made under paragraph 92(10)(*c*) that an undertaking is for "the general Advantage of Canada".[40] Such statutory declarations have brought within the federal sphere grain elevators,[41] flour mills,[42] and intra-provincial railways.[43] The federal residuary power has been held to be wide enough to permit valid legislative regulation in the field of telecommunications,[44] aeronautics,[45] and atomic energy.[46]

3. The Development and Application of Tests for the Identification of Federal Jurisdiction

The basic principles of federal and provincial jurisdiction in labour relations are well settled. However, as new technology creates new types of undertakings the basic framework must be capable of being modified to accommodate them and allot them a place in the constitutional framework. From the beginning, the courts have declined to devise a general formula, which, although it would streamline the decision-making process, could inhibit the determination of constitutional jurisdiction over these new areas of endeavour. The courts have shown admirable restraint and have proceeded on a case by case basis[47] despite the existence of numerous situations where federal and provincial activities overlap within a single enterprise.

This method of proceeding has demanded a sophisticated evaluation of the relative importance of federal and provincial elements to an enterprise and degree of connection between those elements. In the *Stevedoring Reference*,[48] the Supreme Court of Canada found that the employees of Eastern Canada Stevedoring, a company providing stevedoring and terminal services for inter-provincial shipping and engaged

exclusively in the loading and unloading of ships pursuant to contracts with shipping companies, were employed ". . .in connection with. . ." a federal undertaking. In reaching this conclusion, the court established a *prima facie* test which has since been followed with some consistency. The activity must be ". . .intimately connected. . ." with the federal work, undertaking or business,[49] in the sense that it is an ". . .integral part. . ."[50] of such federal activity. The judgment of Mr. Justice Rand[51] departed from a technical consideration of functional inter-relationship and advocated a policy approach based upon a balance of convenience. This approach has not been regarded as the authoritative test.[52]

In the *Stevedoring Reference*[53] the employees engaged in loading cargo were clearly essential to the total operation of the transportation of goods by water. In later cases, activities at varying degrees of remoteness[54] from the core operation have been held to lack the intimate connection which would bring them within federal jurisdiction. If, for example, the allegedly connected activity were merely a service or a convenience peripheral to the federal operation, that would not be sufficient to rebut the presumption of provincial jurisdiction over labour relations.[55] In practice it appears that a three-part procedure is followed to determine jurisdiction over a particular group of employees: first, the existence of a federal work or undertaking must be ascertained;[56] secondly, the activity in question must be found to be integrally part of the federal activity;[57] and finally, the employees in question must be held to be performing that federal work.[58]

It is evident that the results of the evaluation of the integration of activities in given cases has not been readily predictable by the parties to an application before the administrative boards. This may in part be seen as an inevitable result of the broad, general nature of the test. The approach demands a sensitive assessment of the functional inter-relationship between the federal and the related activities.[59] An example of the application of this general guideline is the resolution by the courts of questions of jurisdiction regarding employees engaged in construction work. Construction work, even where related to a federal work, has been held to be within provincial jurisdiction.[60] As a preliminary activity it lacks any truly integrated relationship to the federal work. By contrast, the subsequent maintenance activities of the federal facility have been held to be integrated into it as ". . .functions essential to the safe and proper operations of [the federal work]. . .".[61] A second explanation for the unpredictable nature of decisions on this important question is the inconsistent way in which labour boards and courts have applied the test of integration.[62]

An application made by virtue of a statutory right created by labour relations legislation must be made before the Board with the constitutional jurisdiction to entertain it. If there is doubt as to which labour relations board has this jurisdiction then the lodging of an application with the wrong board is not unlikely. The procedural delays consequent upon such a misapplication may have serious consequences in the case of an application for certification because of the volatile nature of labour relations. It might be supposed that where one Board determines that it lacks jurisdiction, the union need only file its application with the other board. However, the passage of time between the initial application to one board and a determination by that board or the courts that it lacks jurisdiction can be fatal to the union's organizational efforts. Changes in personnel through turnover and changes in attitude on the part of members of the proposed bargaining unit may result in a loss of majority support by the Union. Moreover, there is no guarantee that a decision by one board that it lacks jurisdiction will persuade the other board that it has jurisdiction.[63]

While some boards have expressed their awareness of the problem of error in selection of a board and attempted to expedite matters, their remedies are ameliorative rather than curative.[64] It would appear timely for serious discussions at the federal-provincial level to determine the feasibility of interdelegation as a possible solution. It may well be possible for one board to grant certification in the name of its federal or provincial counterpart instead of simply transferring the file to it. It is recognized, however, that there are complex legal and practical hurdles to be overcome in developing such a scheme.[65] There is no uniformity at present between the *Canada Labour Code* and provincial legislation in the legal prerequisites for certification. Moreover, every labour relations board has its own way of determining and describing the appropriate bargaining unit. It may also be unsuitable to delegate the right to certify without delegating as well jurisdiction over the unfair labour practice provisions which protect the right to freedom of association. These difficulties notwithstanding, it is essential to the realization of a central policy objective of labour relations legislation, the fostering of the right of association and collective bargaining, that a solution be found to the problem of ascertaining constitutional jurisdiction.

B. PROCEDURAL AND SUBSTANTIVE JURISDICTION OF THE BOARD

1. Procedural Jurisdiction of the Board

The head office of the Board is fixed by statute in the National Capital Region. The Board may, however, determine when and where in Canada it will conduct its business.[66] The Board has broad jurisdiction to establish its own procedures, being empowered to make regulations setting the rules of procedure for its hearings and those with respect to applications referred to it.[67] Under federal legislation the decision as to when the parties will be given a hearing upon any application for certification lies within the discretion of the Board.[68] Specific powers granted to the Board with respect to the conducting of its hearings are the power to summon witnesses, to determine the way in which evidence will be taken and to rule on its admissibility, and to adjourn and postpone the proceedings.[69] The Board is also empowered to order the holding of a representation vote among the employees affected by a proceeding before it.[70] The Board has the power

> (*m*) to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding.

This power has been narrowly construed by the Supreme Court of Canada.[71]

2. Adjudicative Jurisdiction of the Board

The Canada Labour Relations Board is vested with both administrative and judicial functions, having the power to determine the rights of the parties by application of legal principles and policy considerations and to issue binding orders. The Board has the power to determine any question that may arise in proceedings before it, including whether a person is an employer or an employee or a member of a trade union, the appropriateness of a proposed bargaining unit and whether a collective agreement is in force and who is bound by it.[72] The Board is also empowered to fix the date as of which the Board will determine whether the trade union has the support of a majority of employees.[73] The Board may issue interim decisions[74] and its orders and decisions are final and not subject to review except as permitted by section 122.[75] The jurisdiction of the Board includes the power to determine the extent of its own jurisdiction[76] and the Board has the power to review, rescind or amend its own orders or decisions.[77] At the request of any person or organization affected, and if the Board

considers that there is some indication of a likely failure to comply with an order or decision, or for such other good reason as the Board may determine, the Board may file such an order or decision with the Federal Court. Upon filing it will take effect as if it were a judgment of that court, without any further proceeding.[78]

3. Substantive Jurisdiction of the Board

The Canada Labour Relations Board exercises its powers and performs its duties in relation to the matters entrusted to its administrative responsibility under the *Canada Labour Code*. The Board thus exercises jurisdiction over the following important substantive matters: certification, unfair labour practices, successor rights, technological change, unlawful strikes and lockouts, imposition of a first collective agreement, the duty of fair representation, disclosure of financial statements, regulation of union hiring hall procedures, access to the employer's premises, the duty to bargain in good faith and safety standards.[79] In the following sections these areas will be examined in some detail.

(i) Certification

While an employer may voluntarily recognize a trade union as bargaining agent for its employees, the *Canada Labour Code* permits compulsory recognition and the imposition of the bargaining relationship through the process of certification.[80] If the applicant trade union satisfies the Board that the majority of the employees in the proposed bargaining unit wish to be represented by it and that the unit in respect of which the application is made is appropriate, then the Board has the duty to certify the applicant.[81] It is not necessary for the applicant to have as members a majority in the unit. The earlier policy of requiring an applicant trade union to have such a majority at the time of application[82] has been abandoned in favour of a system which recognizes trade unions as applicants but does not require initial membership of a majority of the employees in the union. Nevertheless, if the union does not have majority membership, then it must receive the support of the majority of votes cast in a representation vote.[83] The Board must order such a vote if the level of union support is between thirty-five and fifty percent of the employees in the unit.[84] The Board is empowered to disregard stipulations in the union's constitution as to the admission of members if the union's practice has been to disregard these criteria of eligibility.[85]

In determining what unit is appropriate for collective bargaining the Board may vary the unit requested by the parties.[86] Certain

statutory guidelines are provided, but the Board has a wide discretion to evolve policy with respect to bargaining units.[87] The Board has authority to declare a single bargaining unit for two or more employers in the longshoring industry or other industry stipulated by regulation.[88]

The Board has a duty to consider applications for certification made during the periods specified in the statute or at such other times as the Board may consent to.[89] Where a trade union is so influenced by an employer that its fitness to represent employees is impaired, the Board has a duty to refuse certification. In this case, voluntary recognition of a bargaining agent receives no protection under the *Canada Labour Code*: a collective agreement in existence between a collusive union and an employer constitutes no barrier to an application for certification by another trade union.[90] The Board has a duty to refuse certification to a union which denies membership (by policy or practice) to any employee in the proposed unit.[91]

In certifying a bargaining agent, the Board vests the agent with exclusive authority to bargain collectively for the employees of the defined bargaining unit. If no collective agreement is in force either the employer or the trade union can give notice requiring the other party to commence collective bargaining.[92] If a collective agreement is already in force, the certified bargaining agent is substituted as a party to it with the right to require the employer to begin collective bargaining with a view to amending the agreement three months after the certification.[93]

Just as the Board has a duty to certify an applicant union upon its meeting certain requirements, so it has the duty to revoke the certification at the request of an employee claiming to represent the majority in the bargaining unit, if the majority no longer wishes that union to represent them.[94] The effect of the revocation is to render any existing collective agreement ineffective as of the date of revocation of certification or from such later date as the Board considers appropriate.[95]

During the twelve month period ending March 31, 1977, 181 applications for certification were received by the Board.[96]

(ii) Unfair Practices

An unfair labour practice is a form of conduct which though not unlawful at common law is prohibited by statute because it permits either of the parties to thwart the normal functioning of the collective bargaining process envisaged by statute[97] or to render illusory the right

of association which is a fundamental postulate of the *Code*.[98] The sanctions seek to protect the rights of trade unions, individual employees and employers at critical stages of the collective bargaining process.[99] An employer is restrained from interfering with the formation or administration of a trade union or the representation of employees by a trade union, although the facilitating of union activities, which does not constitute undue influence, is permitted.[100] The employer may not negotiate a collective agreement with a trade union that is not the bargaining agent for the unit.[101] The employer is restrained from discriminating against employees for involvement in union activities or for exercising any right created under Part V.[102] Prohibited practices include refusal to employ or to continue to employ, suspension, transfer or laying-off or any discrimination against any person with regard to employment, pay and work conditions, or threats of or actual disciplinary action because of union activity. Such compulsion is likewise prohibited in response to an employee making disclosures, applications or complaints or giving testimony as provided for in Part V and to an employee's exercise of his rights to participate in a legal strike or to refuse to fulfil the functions of one who is so participating.[103]

Prohibitions against failure to comply with the statutory scheme for collective bargaining are also imposed upon a trade union in its relations with an employer. Where a trade union is not the bargaining agent for the unit, it is prohibited from seeking to compel the employer to enter into collective bargaining or, where a bargaining agent is already in place, from bargaining or entering into a collective agreement with respect to that unit.[104] A trade union may not interfere with the formation or administration of an employer's association.[105] Restraints are imposed upon a trade union's intervention in the relations between employer and employee. Organization activities may not take place at the work place during working hours, save with the employer's consent and a union may not require an employer to terminate a person's employment because the union has expelled or suspended that person for reasons other than a failure to pay union dues.[106] Certain forms of conduct by a trade union towards an employee are prohibited as unfair labour practices. A trade union may not discriminate against an employee in the application of union disciplinary standards or of its membership eligibility rules, or penalize the employee for refusing to contravene Part V.[107] The employee's freedom to testify, make disclosures, applications or complaints under Part V is protected by the prohibition of a trade union's imposition of sanctions in the form of expulsion or suspension from union membership, or disciplinary action.[108] A general prohibition is placed upon the exercise by any person of compul-

sion to force an employee to become or refrain from becoming a member of a trade union.[109]

The Board has exclusive jurisdiction to hear and deal with unfair labour practice complaints which allege violations of sections 148, 184 and 185.[110] However, it would appear that prosecution is available for violations of sections 136.1, 124(4), 161.1 and 186. A complainant must make a complaint in writing not later than ninety days from the day of his actual or deemed knowledge of the facts giving rise to the complaint.[111] A complainant must first exhaust any grievance or appeal procedure established for that purpose. If, where a grievance procedure was available, a trade union has dealt with a complaint in an unsatisfactory or dilatory way[112], or if the Board is of the opinion that a complaint of expulsion or suspension from a union should be dealt with expeditiously or that the grievance procedure was not made accessible, then the Board may hear the complaint.[113] The Board's jurisdiction to hear complaints of employer and trade union unfair labour practices with respect to interference with the statutory bargaining relationship[114] is subject to the Minister's consent.[115]

The sanctions available to the Board are wide. They are designed to enable the Board to restore the situation in the workplace to that existing prior to the offending activity. The Board is empowered to make orders requiring compliance with sections 184, 185 and 186, and may in addition order the employer to reinstate or compensate the employee and rescind disciplinary action.[116] A trade union may be required to reinstate or admit an employee as a member or to rescind disciplinary action and pay compensation.[117] In addition to the specific orders it is authorized to make, the Board may require the doing or the abstention from doing anything that it is equitable to require of an employer or a trade union to remedy or counteract any consequence of a failure to comply that frustrates the objectives of Part V.[118]

Unfair practices constitute a major aspect of the Board's work. During the twelve month period ended March 31, 1977, seventy-one applications were received.[119]

(iii) Successor Rights and Obligations[120]

The *Canada Labour Code* makes provision for the protection of negotiating rights acquired through certification or a collective agreement, in the event of union reorganization, including a transfer of jurisdiction, or the disposition by the employer of his business in whole or in part. The *Code* provides that the successor trade union may be

deemed to have acquired the rights of its predecessor, and empowers the Canada Labour Relations Board to determine any question concerning the acquisition of such rights. The Board may make inquiries and conduct representation votes.[121] In the event of the sale of a business,[122] the right of the trade union to represent employees in the unit affected, to continue an application for certification and to bind the purchaser of the business to an existing collective agreement are maintained by the legislation.[123] The Board has a wide discretion, when the sale results in the intermingling of employees, to re-define bargaining units, determine the identity of bargaining agents and to amend the certification and the description of the bargaining unit in the collective agreement.[124] The Board's jurisdiction in this matter is widely defined and extends to the determination of any question as to whether a sale of a business has taken place and to the identity of the purchaser.[125] The Board received three such applications during the period April 1, 1976 to March 31, 1977.[126]

(iv) Technological Change

Provisions were enacted in the *Canada Labour Code* to ensure that employees should not bear the burden of that industrial conversion from which society as a whole benefits.[127] Technological change is defined in the *Code* as the introduction by the employer of "equipment or material of a different nature or kind than that previously utilized by him. . .", together with ". . .a change in the manner in which the employer carries on the work. . .that is directly related to the introduction of that equipment or material."[128] Where the parties have not made provision for the effects of technological change upon the employees, or stipulated that the mandatory provisions in the *Code* will not apply,[129] then the statute provides for procedures for the revision of the collective agreement in force between the parties. An employer bound by a collective agreement who proposes to make technological changes likely to affect the terms, conditions or security of employment of a "significant number of his employees", must give notice of his intentions.[130] Within thirty days of the receipt of such a notice, the bargaining agent may apply to the Board for an order granting leave to serve notice on the employer to commence collective bargaining.[131] If the employer fails to give notice, upon any application by the bargaining agent within thirty days of deemed or actual notice of the changes to be made, section 151 gives the Board jurisdiction to determine whether the employer was under an obligation to give notice and if he was to order the employer not to proceed with the change for a period not to exceed ninety days. The Board's powers under section 151 include the making of orders for the reinstatement of employees

displaced by the changes and the reimbursement of their consequent losses.[132] Where an employer has given notice under section 150 or where the Board has made an order under section 151, the Board may grant leave to the union to serve notice to commence collective bargaining.[133] The effect of such leave is that technological change is suspended until collective bargaining results in a new agreement or the right to strike or lockout is acquired.[134] The jurisdiction of the Board in relation to technological change includes broad powers of adjudication and the authority to order the employer to refrain from undertaking certain types of action with respect to the operation of his business and to perform certain positive acts with respect to the employees.

Applications for orders under section 151 have been infrequent. Three applications made in 1973 were rejected; two made in 1974 were withdrawn. One application in 1975 was withdrawn. A second one was made in 1975 and one in 1976, both of which were rejected, and of the two submitted in 1977, both were withdrawn. No applications have been made in 1978.[135]

(v) Strikes or Lockouts

The prohibition against strikes and lockouts during the term of the collective agreement and the prohibition of strikes over jurisdictional or recognition issues or over the application or interpretation of collective agreements has been a policy of federal legislation since 1944.[136] The powers of the Board in relation to illegal strikes and lockouts has been significantly increased by recent amendments to the *Canada Labour Code*.[137]

The *Code* provides that no trade union shall declare or authorize a strike and no employer shall cause or declare a lockout until either party has given timely notice to bargain collectively and, the parties having failed to reach agreement, seven days have elapsed since the mandatory conciliation procedures have been exhausted.[138] An employee is prohibited from participating in a strike unless he is a member of the bargaining unit in respect of which notice to bargain has been given.[139] Earlier legislation provided for prosecution, with the Minister's consent, for failure to comply with these provisions[140]. Recognition of the inadequacy of monetary penalties to secure the implementation of policy in this area prompted the conferring upon the Board of jurisdiction over more effective sanctions.[141] The aggrieved party may make application to the Board for a declaration of the illegality of a strike or lockout, and the Board, after permitting the respondent to be heard on the application, may order the offending party

to cease committing the act complained of.[142] In effect, Parliament has conferred upon the Board a jurisdiction to grant orders formerly available only from the superior Courts.[143] In making an order the Board has the power to formulate it in such terms as are considered necessary and sufficient for the period of time considered appropriate. Upon application by a party, the Board may vary or revoke an order.[144] The illegal strike or lockout remains an offence punishable upon summary conviction,[145] but the jurisdiction of the Minister over consent to prosecute has been transferred to the Board.[146] Although there were only eight applications for such orders for the twelve month period ending March 31, 1977, this is a likely area of increased Board activity in the future.[147]

(vi) Imposition of a First Collective Agreement

The Board has recently acquired jurisdiction to intervene under certain circumstances in a material way in the process of negotiation of a first collective agreement. If the parties have failed to reach agreement during collective bargaining and the provisions for conciliation have been complied with, the Minister may direct the Board to inquire into the dispute, if the parties have never concluded between them a collective agreement. If the Board considers it advisable, it is empowered to settle the terms and conditions of the collective agreement between the parties.[148] Guidelines are provided for the Board in the exercise of its new jurisdiction. The Board is required to conduct a hearing. The Board may consider the good faith of the parties, when attempting to reach agreement prior to the Board's intervention, and any matter which will assist it in arriving at fair and reasonable terms and conditions.[149] In inviting the Board to take account of collective agreements in force in similar sectors of employment, Parliament has opened the way for the Board's performing the function of interest arbitration,[150] in addition to its adjudicative function. The fixing of the actual terms of the collective agreement is normally left to the bargaining powers of the parties.[151]

(vii) Trade Union Accountability to the Employee

Recent amendments have increased the degree of accountability of a trade union of the bargaining unit. Jurisdiction over a trade union's failure to fulfil its new statutory obligations has been vested in the Canada Labour Relations Board.

(a) *The Duty of Fair Representation*

The Board has jurisdiction to hear complaints that a trade union has failed to comply with the statutory duty imposed upon a bargaining agent to represent fairly and without discrimination all employees in the bargaining unit.[152] The Board's new jurisdiction over the duty of fair representation is indicative of the growing power of the Board to intervene in the internal affairs of a trade union in the interests of the individual employee.[153] The Board has authority to make an order obliging a union to fulfil its duty by taking and carrying on, on behalf of the employee or assisting him in so doing, such action as should have been taken.[154] The Board may also consent to the prosecution of a trade union for failure to fulfil its obligation.[155]

(b) *Disclosure of Financial Statements*

The Board has jurisdiction to order a trade union[156] to file with the Board a financial statement upon a complaint by a member that he has been denied access to an accurate financial statement of the union's affairs.[157]

(c) *Hiring Halls*

If a collective agreement provides for the referral by a trade union of employees to employment, the union must apply without discrimination the rules established for such referrals. The rules must be conspicuously displayed.[158] If a trade union has failed to establish such rules the Board has jurisdiction to deal with the matter as an unfair practice.[159]

(viii) Access to the Employer's Premises

The Board has the power to make an order granting trade union representatives access to employees living in an isolated location upon premises, whether owned or controlled by the employer or someone else, if such access would be the only practical way to permit solicitation of union membership or the negotiation or administration of a collective agreement.[160] Four such applications were made during the period April 1, 1976 to March 31, 1977.[161]

(ix) The Duty to Bargain in Good Faith

Both the trade union and employer are under a duty to bargain in good faith and to make every reasonable effort to enter into a collective agreement once notice to bargain collectively has been duly given.[162] The employer is forbidden to alter rates of pay, conditions of work or any right or privilege without the consent of the bargaining agent until

the right to strike or lockout is acquired.[163] The Board has jurisdiction to hear and determine complaints of failure to fulfil these duties: the Board may assist the parties to settle or make orders for compliance.[164] The Board may also require the compensation of any employee for losses suffered by changes in working conditions or remuneration.[165]

(x) Safety Standards

The jurisdiction of the Canada Labour Relations Board, though an expanding one, was restricted to Part V of the *Code* until 1978. However, the Board is now empowered to exercise an appellate and review function with respect to the decisions of safety officers under Part IV dealing with safety standards in the work place. An employee may require a safety officer to refer a decision that a place or piece of equipment does not constitute an imminent danger, to the Board.[166] The Board is under a duty to inquire into the circumstances and reasons for the decision summarily and expeditiously. The Board may confirm the decision or make any direction it considers appropriate, including the discontinuation of the use of the place or equipment in question.[167] The Board has authority to review a decision by a safety officer that a place or thing constitutes a source of imminent danger upon the request of the operator of the place or equipment.[168] It is an offence for an employer to penalize an employee who requires a safety officer to refer his decision to the Board and the Board has jurisdiction to hear and deal with a complaint against an employer who contravenes.[169] A single member of the Board is competent to hear and dispose of any complaint or reference in virtue of Part IV.[170]

The Board and its officers do not have any claim to expertise in the area of safety. Moreover, applications in this area could come from non-union as well as unionized employers. The Board has no ongoing relationship or familiarity with employers in the federal sector whose employees are not organized and did not solicit the transfer to it of authority over safety matters. It is therefore difficult to understand why Parliament assigned this function to the Board. Perhaps the reason is that no other existing federal body was any better suited to do the job.

CHAPTER TWO

Composition of the Board

I. THE BOARD MEMBERS

The Canada Labour Relations Board presently consists of a Chairman, two Vice-Chairmen, and six other members. The *Code* permits the Governor in Council to appoint three additional Vice-Chairmen and two additional other members.[171] The Chairman and Vice-Chairmen are appointed for terms not exceeding ten years; the term of members is five years.[172] The only statutory qualifications are that the member be a Canadian citizen, not hold any other job or office which provides remuneration to him and be less than 70 years of age.[173] In practice, the persons appointed to these positions have a broad range of experience in labour management relations. The Chairman, Marc LaPointe, Q.C., is a lawyer with extensive teaching and practical experience representing trade unions. Both Vice-Chairmen, James Dorsey and Claude Foisy, are lawyers. Mr. Dorsey's experience includes working with the British Columbia Labour Relations Board as a legal assistant to the Chairman and the practice of labour law representing both trade unions and employers. Mr. Foisy was a member of a Montreal law firm and has a wide range of experience representing employers in labour matters. The six members of the Board, five of whom are non-lawyers, all have experience in labour relations either in management or in the trade union movement.

Unlike many labour relations boards, the Canada Labour Relations Board does not consider its members individually representative of management or employee interests. Panels are not arranged to have the Chairman or a Vice-Chairman sit with one member with a trade union background and one with a management background. Rather, the members are considered by the Board to be non-partisan from the

time they are appointed to the Board. This is consistent with the recommendations of the Woods Task Force.[174]

While the members of the Board are indeed non-partisan, there are distinct advantages to the more conventional tripartite Board, made up of a neutral Chairman and Vice-Chairmen, and an equal number of members from management and labour, which members would be serving in a part-time capacity:

1. By remaining part of the industrial relations community, such members would provide a good means of communication — they can both provide input to the Board concerning community reaction to Board policy and explain to their community the sense of the Board's policies.[175] This can only enhance the reputation of the Board with its clients.
2. This would permit the appointment of a larger number of persons and would mean that a broader range of backgrounds would be represented on the Board.
3. A larger number of members would better enable the Board to react quickly to applications of an emergency nature.
4. Where the members are perceived by the parties as representative, they can play a useful mediatory role when the need for this arises in the course of a hearing.

Would there be more partisanship as a result? This is not the experience elsewhere. According to the former Chairman of the British Columbia Labour Relations Board:

> In the two years of its existence, our Board has been remarkably free of ideological posturing. Some of the most fundamental issues in labour policy under the Code have been addressed seriously, on the merits, and a Board position adopted in unanimous 18-member judgments. On several occasions, members have astonished themselves — although not me — in the Board decisions they have signed. It has been graphically demonstrated that tenured judges have no monopoly on impartial disposition of emotion-laden legal disputes.[176]

The Chairman of the Nova Scotia Labour Relations Board has had the same experience.[177]

It is therefore recommended that the Code be amended to provide for a larger number of members, consisting of equal representation from management and the labour movement. It is further recommended that the present prohibition against earnings from other sources be abolished for part-time members.[178]

Another issue for consideration is the wisdom of the statutory requirement that all adjudicative decisions be made by three persons, one of whom must be the Chairman or a Vice-Chairman.[179] There is no doubt that in many cases where there is a serious factual or legal dispute, the three person quorum is ideal. The person chairing the panel receives real assistance from the rest of the panel in assessing the credibility of witnesses, in discussing the policy implications of possible legal conclusions, and in fashioning the appropriate remedy. Moreover, it is recommended that there be increased activity on the part of Board members in assisting the parties to resolve a dispute.

But that does not mean that a three person panel is necessary in every case. There are many cases of a routine nature that do not require three persons to adjudicate on them. For example, many applications for certification, or for amendment of a certification because of a trade union change of name, are unopposed. Yet, those cases await adjudication until there are three persons available for a meeting. Another concern is in the area of unlawful strike or lockout complaints. If such complaints are not settled, they often demand immediate adjudication. Because Board members may be involved in hearings in other parts of the country, or because available members do not speak the language of the parties, it could be extremely difficult to arrange such a hearing on short notice. In such circumstances, the Board should have the ability to appoint the Chairman or Vice-Chairman to hear the case alone. This would provide the Board with a considerable measure of flexibility and better enable it to meet the needs of the parties.

Certain decisions should continue to require a quorum of three persons. For example, an application under section 119 for reconsideration of a Board decision does not usually require urgent disposition. Given that judicial review is available only in restricted circumstances under the 1978 amendments to the *Code*,[180] such an application merits consideration by a quorum of three.

The Board's clients, employers and unions, commonly agree to arbitration of grievances under collective agreements by single arbitrators. There should therefore be general acceptance of adjudication by a single Board member in certain circumstances. *It is therefore recommended that the Code be amended to provide that the Chairman or a Vice-Chairman can constitute a quorum for the purpose of adjudicating on certain matters, such as in the case of an unopposed application, or where relief is requested from a lockout or an unlawful strike.*

II. SUPPORT STAFF

The Chairman is the Chief Executive Officer of the Board. Apart from his role in adjudication (shared with the Vice-Chairmen and other members) he is also responsible for the organization as a whole. Three divisions are responsible to the Chairman for their operation: Administration, Operations and the Registry. The current organization chart demonstrates the present structure.

A. GENERAL DESCRIPTION OF THE FUNCTIONS OF THE FOUR DIVISIONS

1. Executive

The Executive (the Chairman, Vice-Chairman and members) is responsible for adjudication including the holding of *in camera* and public hearings, the making of orders and the drafting of reasons for judgment. The Chairman is also the Chief Executive Officer who retains in practice a final decision-making power with respect to the internal activities of the Canadian Labour Relations Board.

2. Administration

The Administration is responsible for personnel matters, including job classification and hiring, financial matters and the management of supplies and equipment. It provides word processing, copying and messenger services, books hearing rooms, hires recording services, arranges for translation services and acts as the liaison between the Board and the Treasury Board. The orientation of the administrative division of the Board is toward the broader, generalized public service. Its staff's career expectations do not lie within the Board, its method of devising job classifications corresponds to public service categories and its personnel are seen as interchangeable with those in any other division of the public service. They are not involved with the particular function of the Board, namely labour relations and collective bargaining.

3. Operations

Operations is concerned with the processing of applications to the Board prior to disposition by the Board of the application. It is responsible for the holding of investigations, the making of reports, the

transmission of correspondence and documents to the parties and the preparation and completeness of a file so that the Board may proceed to adjudication on an application.

4. Registry

The Registry is the repository of the files, the original receiver of all correspondence coming to the Board with respect to applications and the dispatcher of such communications to the parties. Within its area of responsibility are information and publications services, the library, the clerks to the Board, the compilation of statistics on the Board's work, and the preparation of agendas for hearings.

B. PERSONNEL AND FUNCTIONS

As much of the work directly related to the processing of applications is performed by Operations and the Registry, the functions of the more instrumental personnel in these divisions will be described in some detail.

1. The Secretary-Registrar's Division or Registry

The Secretary-Registrar is responsible to the Chairman for the operation of the Registry. He supervises the functions performed by his subordinates, signs all correspondence, makes staffing recommendations and draws up the budget for the Registry. In the absence of the Board's legal counsel he has been responsible for preparing the record for review in the Federal Court, including the filing of formal notice to participate on instructions from the Board. Briefing of counsel, however, is done by the Chairman or a Vice-Chairman.

The Chief of Board Services acts as Registrar when necessary, assigns clerks to the Board to public hearings and *in camera* deliberations meetings of the Board, draws up the agenda of *in camera* meetings, and schedules *in camera* and public hearings on instruction from the Chairman or a Vice-Chairman. He is responsible for compiling statistics for the monthly and annual reports and the compilation of performance statistics for the Treasury Board. He is also responsible for the Library and Publicity and Information services.

The Application Processing Officer vets applications received to ensure that they meet the requirements established by the *Code* and the regulations, notifies the parties of the reception of an application

and adds any additional information he thinks may be useful to the regional labour relations officer appointed to investigate the application. His activities are described in more detail in Chapter Three.

The Clerk in Charge of Registry is responsible for the stamping and registration of mail, the opening and maintenance of the original file, receiving incoming mail, attaching it to the file it concerns, dispatching it to the labour relations officer and ensuring that copies of it are made for other Board personnel.

The Clerk Computing Performance Reports charts the days taken at various stages of the processing operation. This work began with the fiscal year 1976-77.

The Clerks to the Board attend *in camera* meetings and public hearings. At present there are two permanent clerks and one filling in. The Chairman would like to have two fully bilingual senior clerks based at headquarters who could prepare more detailed minutes. The clerks prepare lists of pertinent documents, indicating which have been sent to the parties. They prepare statements of facts for hearings. During public hearings, they are responsible for exhibits filed, copying of documents, the taking of brief minutes, the recording of orders, and the explanation of any Board question on the file. After the hearing they are responsible for issuing orders made by the Board.

2. Operations

The Director of Operations co-ordinates the overall efforts of Operations in headquarters and the regions. He is responsible for planning and policy and advises the Board on these. He distributes the workload and oversees the processing, inquiring into delays, and the progress of an application.

The Deputy Director (East) supervises the labour relations officers in the Eastern Division and headquarters, appoints a headquarters officer to an application and consults with the regional supervisor in the appointment of a regional labour relations officer. He is the line of communication between Eastern Division labour relations officers and the Board and inspects all correspondence and reports emanating from labour relations officers in eastern Canada.

The Deputy Director (West) performs a similar role for the Western Division.

The Specialist, Unfair Labour Practices (Operations) treats unfair labour practices unlike all other applications. The Board has appointed a Specialist, Unfair Labour Practices who is responsible for the entire processing of a complaint. He decides whether a settlement will be attempted or whether the case should proceed directly to a hearing. He advises the Board upon the complaint and supervises the efforts of the officer to settle. Regional investigating officers deal with him, rather than their supervisors, in handling unfair labour practice complaints.

Labour Relations Officer (Headquarters) processes the application after vetting and handles the correspondence and the transmission of documents and receives the investigation report prepared by regional labour relations officers.

Labour Relations Officer (Regional) conducts an investigation with respect to an application received and writes a report to the Board. With respect to applications for certification, he sends the letter of understanding to the parties to clarify their position on the bargaining unit. Where the investigation is done at headquarters, the headquarters officer will also be the investigation officer. He also attempts to settle unfair labour practice complaints where appropriate.

Officers have a wide range of other functions. They are the only representatives of the Board that many of the Board's clients ever meet. Officers must therefore be familiar with the Board's procedure and jurisprudence. They are often called upon to explain Board policy or to assist in the preparation of an application.

The Board's officers are to be commended for some of the informal work they do. For example, when Parliament passed the 1978 amendments to Part V, but before the amendments were proclaimed, the officer in the Atlantic region had several meetings with certain unions he felt might be affected by new provisions concerning hiring halls. His purpose was to render what assistance he could in correcting potential violations of the new provisions. The Western Region's officers have made a particular effort to become familiar with the unique problems faced by the construction industry and building trade unions in the Yukon.

Board Counsel prepares the case-book in connection with cases before the Federal Court, and in general, gives legal opinions.

C. THE APPOINTMENT OF LABOUR RELATIONS OFFICERS

Educational background is not the most important criterion in selecting labour relations officers. What is required is an energetic, bright, perceptive, analytical person. Though experience is an asset, these latter qualities may override it. It is apparently difficult to find people with Board experience. Appointments are through Public Service competition and there has been a tendency to open them only to internal competition because of overstaffing in other sections of the Public Service. No special effort is made to give equal representation to labour and management in these appointments.

Labour Relations Officers are the first direct link between the Board and the public and it is essential that they be seen as responsive, accessible, energetic, concerned and professionally competent. The effectiveness of the work done on behalf of the Board by its labour relations officers may significantly affect the Board's effectiveness in fulfilling its mandate.

In general, the Board's staffing needs are not perceived as different from those of other government departments or agencies. There is a presumption of interchangeability of officers. Many appointees are public servants from federal departments with an emphasis upon the Department of Labour. This trend will apparently increase because of the policy of appointment through internal competition. The demands made upon a labour relations officer require that he have exposure to the realities of the industrial relations scene and a taste for that kind of experience. The demands made upon an officer whose function is primarily investigatory are that he have an inquiring mind, ask questions and have a personal interest in the matter. The role of the officer in unfair labour practices also requires skills in mediation. If officers are to play a broader role in the future[181] then expertise in the real work of labour relations must be sought in officers: persons with a genuine feeling for labour relations who seek frequent day by day involvement with this world must be sought as officers if the Board is to be effective as its jurisdiction and range of functions are increased.

D. RECOMMENDATIONS FOR THE ORGANIZATION OF THE CANADA LABOUR RELATIONS BOARD

The Board needs a simple flexible organization finely tuned to the needs of the work of the Board. The organization must be conducive to the attainment of the objectives of thoroughness and rapid process-

ing and adjudication. The present divisions, Administration, Operations and Registry, reflect organizational patterns typical of large public service departments. Classifications of positions within the Board are done within Administration according to public service concepts; Administration itself is somewhat isolated from the work actually done by the Board and orients its approach and career prospects to the wider public service. Since the creation of the new independent Canada Labour Relations Board in 1973 there have been continual attempts to create a more effective internal organization for the Board. Both a continual expansion of jurisdiction and the novelty of the Board have confronted the internal organization with problems of structuring to meet the challenge. The process has been marked by continual minor changes and shifting of duties between individuals. A cumbersome overall structure with isolated units within it cannot be seen as a final solution. The existence of three divisions responsible to the Executive has an inbuilt tendency to cause Board personnel to divide each activity into stages corresponding to the three existing divisions. An examination of the flow chart in the appendix will show how frequently the processing moves from one division to the other. The disadvantage of this is that not only are there superfluous extra steps, but there is also time lost each time the processing goes into another division because there it mingles with the other work of the new division and must take its place within the priorities of that division.

Each division feels a responsibility for its own phase of the operation but no one division controls the time taken or the quality of the work. No one has final responsibility and control over time-sensitive materials. While the Director of Operations is responsible for the flow of work through Operations, he has no control over the flow of work through Registry or Administration, who both intervene frequently in the processing.

A further serious problem is the absence of any one individual reporting to the Chairman to take responsibility for structural modification. The pattern of re-organization to date has been one of continual minor modifications, reluctance to delegate responsibility for work and the assignment of persons left behind by such tinkering to special projects. These special projects are then seen to require additional staff, assistants to the person in charge. The overall picture is one of proliferation of personnel and elaboration upon a structure. That the Board functions as well as it does is a credit to the flexibility and cooperativeness of the persons working within it. As the Chief Executive Officer, the Chairman is responsible for internal organization, in addition to his adjudicative function. It is unlikely that he would have the time

to devote to the systematic management of the organization. Senior staff bring problems to his attention from time to time, or he himself may note a particular need, but there is no one who has the authority or time to devote to a systematic and continuing assessment of the organization based upon the needs of the work flow through the Board.

Recommendations for changes in processing have been made in the section dealing with that subject. While these may be useful in themselves or in the context of the existing structure they are not seen as a remedy for the basic organizational problems.

What appears to be clear is that it is essential to provide the Chairman with one person responsible for the administration of the Board. The functions of such a person would include the devising of an organization which is particularly suited to the needs of the Board. His position should be a senior one. His would be the responsibility for continual monitoring and evaluation of the effectiveness of the existing organization: if changes were made, they would be in response to the overall work flow of the Board. He would establish guidelines as to the deadlines to be met in respect of all phases of the processing, including the drafting and issuing of decisions, to meet the requirements for rapid processing. To that extent he would be monitoring applications even when they are in the care of a Vice-Chairman, awaiting decision.

An immediate recommendation is the unification of the tripartite divisions of Administration, Operations and Registry into one Secretariat to serve the Executive. The person in charge of this Secretariat could proceed from this point to re-organize a more simple, flexible division of responsibility within this framework.

CHAPTER THREE

Board Procedures

The creating and fostering of public confidence in a labour relations board depends in large measure on the quality and promptness of its decisions. Procedures adopted by a board have much to do with both attributes. It is essential that these procedures are efficient and result in the board having sufficient information to make a reasoned decision.

This chapter is an analysis of the Board's procedure in handling an application, from receipt of it to publication of the eventual decision. Although the procedure of the Board is described in a step-by-step fashion, it is important that these steps be considered merely the individual elements of a unitary decision-making process: the relationship between the steps must be continually synchronized. It makes little sense to foster artificial distinctions between the steps preparatory to adjudication and, adjudication itself.

There are exceptions to the procedures typically followed by the Board in handling applications which will be dealt with separately. First, the Vancouver regional office has been given much more autonomy than the other regional offices. The Vancouver office has almost complete responsibility for applications from its area, up to adjudication. Second, unfair labour practice complaints and complaints of unlawful strikes and lockouts are processed differently.

I. RECEPTION OF APPLICATIONS

A. APPLICATIONS TO THE OTTAWA OFFICE

Every application to the Board's Ottawa office (except unfair labour practices and strike and lockout allegations) undergoes the same time-consuming procedure. It is received in the mail room and

delivered by messenger to the Registry. The Registry date stamps the application and forwards it to the copy room. Some six copies are made: one for the Chairman, one for the Vice-Chairman, two which are kept in separate files for the two members who may eventually be considering the case, and two for the master and duplicate master file. The application is then delivered to the Application Processing Officer. This officer performs the "vetting" function — he checks the application to determine that it complies with the requirements of the *Code* and the regulations. He also notes in the file any background information, relevant Board decisions, or other comments based on his experience. He then passes the file and a vetting sheet to the Secretary Registrar, who in turn checks the work of the Application Processing Officer. If everything is in order, he signs the vetting sheet. If an application is considered not to fulfil the statutory requirements, the matter is discussed with the Chairman or a Vice-Chairman.

Once the application has been vetted and approved by the Secretary Registrar, it goes to the Operations Division. Senior personnel in Operations appoint a headquarters officer and an officer in the region from which the application emanated. If the region has an office with more than one labour relations officer (Montreal, Toronto and Vancouver), the regional office will be contacted to determine which officer it would be most suitable to appoint. This decision is based on the nature of the case and the abilities and workload of the officers.

The function of the headquarters officer is to attend to the handling of all documentation and correspondence in connection with the file. The regional officer's task is to investigate the application and to make a report. However, all written interventions and replies are made directly to the headquarters officer. The headquarters officer also checks the regional officer's report and advises the regional officer if there is any apparent discrepancy or oversight in it.

Occasionally, Operations will not appoint an officer. For example, a routine application by a trade union to amend a certification to reflect a change in the trade union's name or an application asking the Board to reconsider a decision it has already made will often not call for the appointment of an officer.

Once the officers' names have been determined, the application is returned to the Application Processing Officer. He then has the Registry open a file. Next he proceeds to prepare routine correspondence acknowledging receipt of the application and transmitting a copy of the application to the respondent. If the application affects employees,

he also prepares a notice for posting at their place of employment. These documents are forwarded to the word processing section. This area is another source of delay. Materials which are destined for external communication arrive in the pool and are mingled with work from other sources. The supervisor fills out requisitions and allocates the work. When the routine correspondence is typed, it is checked by the supervisor in word processing and returned to the Application Processing Officer. The letters are prepared for the signature of the Secretary Registrar. This function has presently been delegated to the Application Processing Officer.

The typed letters are then taken to the copy room for photocopying. When this has taken place, the correspondence is placed in the mail.

This initial procedure consumes between two and four days.

B. APPLICATIONS TO THE VANCOUVER OFFICE

A limited amount of decentralization has taken place with respect to the Vancouver regional office of the Board. Applications emanating from British Columbia, Alberta, the Yukon and the western part of the Northwest Territories are filed in Vancouver. As well, for purposes of convenience, applications from the Service, Office and Retail Workers' Union of Canada and the Office and Technical Employees Union which emanate from Thunder Bay or anywhere west of Thunder Bay are also filed in Vancouver. At that point an officer in the Vancouver office checks the application for compliance with the *Code* and regulations. He also transmits a copy of the application by telex to Ottawa, where the application is vetted by the Application Processing Officer. A headquarters officer is appointed and the Vancouver office is advised as soon as these procedures have been completed. At that point, the Vancouver officer prepares and transmits the routine correspondence and the notice to employees. All submissions from the parties are sent to the Vancouver office and transmitted by it.

The Vancouver office, doubtless due to its size, has not developed the formality of procedure characteristic of the Ottawa office. The workload usually permits processing in a short period of time. Applications sent by Vancouver to Ottawa for vetting are received back sometimes on the same day but, more often, one or two days later.

C. APPLICATIONS CONCERNING UNFAIR LABOUR PRACTICES AND UNLAWFUL STRIKES AND LOCKOUTS

There are compelling reasons for ensuring that there is no delay in the processing of unfair labour practice complaints. As discussed in Chapter One, the unfair labour practice provisions protect employee freedom of association. The prompt enforcement of these provisions is fundamental to the attainment of the Board's objectives. Moreover, many unfair labour practice complaints allege unlawful termination. It goes without saying that such an application should be treated as a priority. Similarly, an unlawful strike or lockout has an immediately adverse effect on the employer, the employees and the public. Such an application also demands immediate attention. The Board has therefore implemented more streamlined procedures for the processing of such applications.

When unfair labour practice complaints are received, the original complaint is date stamped and brought directly to the Head, Unfair Labour Practices. He checks it for compliance with the procedural requirements of the *Code* and regulations. However, if there is an element of urgency — for example if unlawful termination is alleged and there is a continuing loss of income — the application will be processed despite technical deficiencies and these deficiencies are remedied later. The Head, Unfair Labour Practices then appoints a regional officer unless it appears unnecessary. All of this is done immediately. There is no division of responsibility between Registry and Operations; the chain of command is replaced by a team.

At this early stage the Head sometimes obtains a hearing date from the Chairman or a Vice-Chairman. This will ensure that the matter will be decided as quickly as possible. As well, the mere fact that a hearing has been scheduled may assist the Labour Relations Officer in his efforts to bring about a settlement.

The same expeditious treatment is accorded to complaints of an unlawful strike or lockout. In fact, the Board will act on an application received by telephone. The Head, Unfair Labour Practices in such cases usually informs the Chairman or a Vice-Chairman of the existence of the complaint so that, if necessary, a hearing can be arranged immediately.

D. RECOMMENDATIONS

That the Board's procedure in processing applications received works as well as it does is a credit to the ability of the Board's personnel. The procedure is characterized by duplication and delay. Much of the awkwardness can be traced to the fact that Operations and Registry are separate departments and function that way. Secondly, the "assembly line" method of processing appears to be ill-suited to the Board's needs. Too many persons must become familiar with each file. The many persons responsible for some step in the processing of an incoming application have other duties as well. Therefore, each time the application reaches a particular person's desk, it becomes intermingled with other work and takes its place on that person's list of priorities. Thirdly, there is, in our view, too much checking of other people's work and not enough delegation of authority.

It has already been observed that Operations and Registry should not be separate divisions.[182] However, in addition, *it is recommended that when an application is received by the Board's Ottawa office, a particular officer should be immediately designated to deal with it. This officer should have overall responsibility for opening a file, checking or vetting the application, preparing the routine correspondence and documentation in connection with it and dispatching the necessary material to the regional labour relations officer.* This officer would continue to monitor the file and do what the headquarters officer now does. *It is also recommended that this officer sign the correspondence to the parties.* In that way, if one of the parties has an inquiry concerning the status of the application, he knows whom to contact and can expect ready answers. The selection of an officer could be based on the type of application. Thus, officers could acquire expertise in particular sections of the *Code* and perform more effectively.

No reason can be seen for concluding that the type of streamlined procedures already adopted for unfair labour practices would not be just as feasible for other applications. In light of the experience and ability of Board personnel in Operations and the Registry, we do not think there would be any significant loss of overall accuracy if much of the checking of the work of others were eliminated.

The volume of work processed by the Board is not so great that the less formal procedures recommended here are impractical. During the five month period from April 1, 1978 to August 31, 1978, 256 applications of all types were received by the Board. Of these, 73 were

from the Pacific region and most of that latter number were processed in Vancouver. Thirty-eight applications were unfair labour practice complaints which were processed separately. Therefore, on the average, fewer than two applications are received for processing per working day. This level of activity does not seem to require an elaborate assembly line approach.

Word processing at both the initial and subsequent stages of an application is another source of difficulty. Again, it is felt that the formality of the procedure is not suited to the volume of work. Typing work is presently checked by two persons — the supervisor and the person who requested it. It would appear preferable that the officer responsible for a file work directly with a typist. Priorities could then be established between the two of them. The typing would be checked by one less person.

The procedure adopted in Vancouver appears to be worthwhile. It permits informal discussion between Board officers and the applicant or respondent. This sometimes happens even before the application is made. However, it must be noted that there is an element of duplication created by the decentralization. The vetting or checking which takes place in Vancouver also takes place in Ottawa. This is hardly necessary.

II. INVESTIGATIONS

Nearly all applications received by the Board result in the appointment of a labour relations officer. His task is to gather information which the Board will require in order to adjudicate on the merits of the application.

The scope of the investigation and report at present is the gathering of pertinent materials for adjudication. The investigation consists of the reception of documents from the parties, verification of membership cards in certification applications, and some analysis and classification of documents received by the parties. The facts which the Board wishes included in the report are limited. In fact, the report contains little more than matters which are not in dispute. Most officers make the effort to travel to the place of business of the employer and to actually meet with the parties. Exceptions are made where weather or the pressure of other files make this impossible.

The report is really no more than an annotated bibliography of the documents obtained. It is of limited usefulness to the Board because in many cases the officer does no more than outline facts and positions taken by the parties which are already apparent from the parties' written submissions to the Board.

Recently, the officer's role has been expanded somewhat to include efforts to effect a settlement of disputes. This is especially visible in the area of unfair labour practices, but arises elsewhere as well. For example, in a recent application at Cape Breton Development Corporation in Nova Scotia, there was a dispute as to whether the incumbents of 125 positions were included or excluded from the definition of "employee" in the *Code*. Largely through the efforts of the officer, a settlement was reached with respect to all positions. Efforts to mediate unfair labour practice complaints have been quite successful to date. During the 12 month period ending March 31, 1978 the Board processed 109 complaints of unfair labour practice. Of that number, 52 (or nearly 48%) were either withdrawn or settled through the Board's efforts.

In our discussions with officers it appears that the development of this mediatory role has been received with enthusiasm. It has enriched the content of their jobs and thus made them more interesting.

We recommend that the Board increase its efforts to use its officers to achieve settlements. The value of settlement in labour relations is enormous. First, it permits the Board to spend more of its time on the rest of its workload. Unfair labour practice complaints, as discussed below, often require hearings because the merits of a complaint turn on findings of fact. Moreover, there has been a dramatic increase in the number of unfair labour practice complaints received. During the 12 month period ending March 31, 1977, only 71 complaints were filed. As organizing efforts continue in such industries as banking, it will become increasingly useful to the attainment of the Board's objects that such settlement activities be carried on.

Secondly, the settlement of unfair labour practice complaints is often conducive to the attainment of a good collective bargaining relationship between the parties. These complaints often occur because of activities during the organizing period. At this point the employer and union typically have no familiarity with, and considerable distrust for each other. Settlement of their differences through the efforts of a third party is obviously a more constructive beginning to a collective bargaining relationship than a formal hearing before the Labour

Relations Board with the result determined by adjudication rather than by agreement between the parties themselves.

The limited form of report received by the Canada Labour Relations Board has been described in the following way by a Vice-Chairman of the Board:

> Easy access to judicial review under section 28 of the Federal Court Act and decisions of that Court dictate a strict adherence to the rules of natural justice. As a result, we require that our officers disclose no information to us, other than evidence of union membership, when reporting they were unsuccessful in settling an unfair labour practice complaint. On applications for certification, their report consists merely of a memo summarizing data communicated to the parties in the letter of understanding, other information that has been submitted or made available to both parties and confidential evidence of union membership. Parties are advised to submit written information directly to the Board on matters of employee status and related questions. In this way, no information comes before the Board that other parties do not have an opportunity to rebut.[183]

This can be contrasted with the very different approach taken to investigators' reports under the *Labour Code of British Columbia*.[184] Industrial Relations Officers under that statute make detailed reports which are not disclosed to the parties. Thus, the former Chairman of the British Columbia Labour Relations Board has described the following scenario:

> It is not uncommon for the Board to receive a letter from the employer saying that his employees have been intimidated into joining the union which has applied for certification. It is also not uncommon for the Board to receive a letter from the Union saying that certain employees have been intimidated by the employer into opposing the certification or applying for decertification. The normal judicial approach to such a contest would be to hold a hearing at which evidence would be taken from the employees under oath and subject to cross examination. But the lesson of experience is that if employees have been intimidated into signing union cards or decertification petitions which they do not believe in, they are not likely to admit that fact under oath with either the employer's manager or the union's business agent looking at them from across the table. Our procedure in these cases is quite simple. We send an industrial relations officer out to the homes of the employees to speak to them privately and with complete assurance of confidentiality. If, as a result of that investigation, we find a consensus among the individual employee statements given to our officer in that setting, by and large we believe that we can place greater confidence in the result than in testimony given in the typical formal hearing.[185]

A panel of the British Columbia Labour Relations Board may well decide a case on the basis of evidence of which neither party has knowledge or opportunity to rebut.

Such a practice, if adopted by the Canada Labour Relations Board, would likely be found to be grounds for review under paragraph 28(1)(*a*) of the *Federal Court Act*.[186] Rather, what would appear to be necessary to the adoption of such a procedure is a statutory provision similar to subsection 19(2) of the *Labour Code of British Columbia*:

> The Board may request and receive a report from a person appointed by the Board to investigate an application or to investigate an attempt to settle a dispute under this Act, a collective agreement, or the regulations, and the Board may, in its discretion, in any proceeding or class of proceedings consider the contents of a report without disclosing those contents to any party.[187]

The experience of the British Columbia Board is that such a provision is extremely useful. Board members there obviously treat such reports with more or less respect depending on their own knowledge of the ability of the particular officer who prepared it.[188] If such a procedure were adopted by the Canada Labour Relations Board, it would certainly provide the Board with more information. Furthermore, in many cases it would obviate the necessity of conducting an oral hearing. This blanket protection also would enable the Board to communicate informally at various stages of the proceedings with the officer and would mean that the panel deciding the case would be much more familiar with the case when it comes to adjudication and would benefit from the familiarity obtained by the officer.

It is recognized that the adoption of such a legislative provision would mark an express departure from a principle of natural justice — that a party is entitled to know the case it has to meet. However, on balance, such a departure would appear to be justified for exactly the reasons outlined by Professor Weiler in the above quotation. If the Board is expected to make a judgment which is sensitive to the industrial relations realities of a case, it seems essential that the Board have the benefit of a candid, and therefore confidential, report from its investigating officer.

A third alternative is that the officer's report contain a full description of the dispute and subjective comments like the British Columbia report, but that the report be made available to the parties and that the parties be entitled to make submissions or lead evidence to rebut it.[189] But that alternative has the disadvantages of both of the first alternatives. If the officer's report is going to be publicized, the officer will undoubtedly be hampered in his efforts to acquire information. He would not be able to assure confidentiality to an employee who felt intimidated about testifying at a hearing. He would also not

wish to include information which appeared to favour one side or the other. He would inevitably feel that the publication of such material would impair his ability to deal effectively with the same parties in future applications. Moreover, the opportunity accorded to the parties to make submissions would lead to delay. The result would likely be that the reports would not be fuller than they are at present but that proceedings would take longer, as the parties took the time to rebut anything in the officer's report to which they took exception.

It is recommended that the Code be amended to provide that the Board may consider the officer's report without disclosing its contents to the parties.

When the officer has made his report it is submitted to Ottawa. It is checked by the Headquarters Officer as well as by others in Operations.

III. NOTE — THE EFFECT OF AGREEMENT OF THE PARTIES

There are two particular occasions in proceedings before the Board where the parties may reach agreement on a matter. In applications for certification, the employer and trade union may agree on the composition of the bargaining unit. In unfair labour practice complaints, the parties may reach a settlement of the complaint. To what extent should such agreement be respected by the Board?

A. AGREEMENT ON THE BARGAINING UNIT

An important part of the officer's task in connection with applications for certification is determining exactly what the positions of the employer and trade union are with respect to the description of the proposed bargaining unit, the precise group of employees the trade union seeks to represent. When he has such information, he forwards a letter of understanding to the parties outlining these positions. Often, the parties agree on the definition. The bargaining unit agreed upon may exclude certain persons who fall within the definition of "employee" in the *Code*.[190]

Where there is such agreement, it is not the Board's practice to accept this bargaining unit unquestioningly. Rather, the Board pursuant to its statutory power to determine the appropriate bargaining unit[191] makes its own assessment and has not infrequently rejected the agreed-upon unit as inappropriate. One of the Board's reasons for not adopting the parties' agreement is that the effect of doing so would be to deprive the excluded persons of the benefits of collective bargaining. Secondly, the Board has expressed the view that it sees the determination of the bargaining unit as a function of the Board expressly delegated to it by Parliament. As the Board put it in *Trade of Locomotive Engineers and Canadian Pacific Limited*:[192]

> [The Board] will not be bound by the agreement of employers and unions (so-called agreed upon units) in determining appropriate bargaining units. However, if an agreed upon unit respects the criteria of the Board, it will be sanctioned. Of course, this Board will always take into account the reasons why a specific group of employees is suggesting or proposing a unit of employees as an appropriate one. But the law is clear that Parliament, faced with the fundamental policies it pursues, has delegated to this Board the duty to analyse the pros and cons of each application and to decide in the final analysis the contents of each bargaining unit.

However, serious questions may be asked about this practice. In the first place, the trade union may have a bare majority in the agreed upon unit. The effect of adding others to it may be to bring about a representation vote or in some circumstances, the denial of the application outright.[193] Thus, the practice could have the effect of denying collective bargaining to everyone in both the proposed bargaining unit and the unit seen by the Board as appropriate.

Secondly, the fact that these positions are excluded by agreement often indicates that the parties holding the positions do not favour union representation and despite the fact that they are technically "employees", identify with management. The effect of forcing them into the unit is that the bargaining unit is less cohesive and more difficult for the trade union to represent adequately. In such a case, the employer and trade union may simply agree during collective bargaining to exclude them from the scope of the collective agreement.[194]

Thirdly, the *Code*, in any event, contemplates voluntary recognition. That is, it does not compel a trade union seeking to bargain on behalf of employees to apply for certification. If the employer is willing to treat the trade union as the representative of its employees and bargain with it, the trade union may not bother with a formal application to the Board. Certainly, in such circumstances, the Board has

no supervisory powers to ensure that the group of employees represented by the trade union constitute an appropriate bargaining unit.

For these reasons, according to one officer, the parties have difficulty in accepting such decisions from the Board.

It is recommended that the Board adopt a policy of accepting as appropriate a bargaining unit agreed upon by the parties unless excluded employees object or unless the unit is in the Board's view wholly inappropriate. In other words, the fact that the parties agree on the bargaining unit should create a very strong presumption that the unit is appropriate. If the Board is concerned that it is thereby creating a precedent, this could in large measure be met by the insertion as a preamble to the Board's order words to the effect that "Whereas the Applicant and Respondent have agreed that the bargaining unit is appropriate. . .".

Further, the Board should as a matter of policy issue reasons to the parties when it determines that an agreed upon bargaining unit is inappropriate.

If the employees in the excluded positions later decide that they wish collective representation, the trade union can make a routine application to vary the certification.[195]

B. SETTLEMENT OF COMPLAINTS

As described elsewhere, the role of the officer in dealing with unfair labour practice complaints includes attempting to mediate the dispute and to bring about a settlement.[196] However, if the parties reach a settlement, the Board will not necessarily grant an application by the complainant to withdraw the complaint. The Board is reluctant to sanction settlements which permit the respondent, in most cases the employer, to gain a benefit from a violation of the unfair labour practice provisions of the *Code*.

When one considers the limited resources of the Board, it is difficult to understand this policy. If permission to withdraw the complaint is not granted and a hearing results, considerable time is devoted to the case. This time could better be spent dealing with cases where the parties are at odds. Even where the Board hears the case where

the alleged violation took place, the parties are put to considerable expense in engaging counsel, preparing for and attending the hearing.

Of equal concern is the effect of the policy on the ability of officers to settle complaints. The view of one Labour Relations Officer, and it is not a surprising view, is that it is extremely difficult to persuade the parties of the settlement if he has to advise the parties as well that any settlement is, in effect, subject to Board approval.

Finally, it is difficult to understand how the Board could determine the fairness of a settlement without actually holding a hearing and considering the merits of the case. A settlement which gives the complainant very little may at first blush seem unfair. However, it would only be on a full examination of the case that the Board could understand that the complainant's case may be very difficult to establish.

The fact of settlement itself is important in labour relations. Unfair labour practice cases usually arise from employer activity during or just subsequent to the trade union's organizing campaign. The relationship between the employer and the trade union is non-existent. Settlement of the complaint is often conducive to the establishment of a good bargaining relationship in the future.

For these reasons, *it is recommended that the Board adopt a policy of granting applications to withdraw unfair labour practice complaints where settlement is achieved through the efforts of its officers.*

IV. ADJUDICATION

Once the parties have made their submissions, and the officer's report has been received in Ottawa, the matter is placed on the agenda of a panel for determination.

A. DECIDING WHETHER TO HOLD A HEARING

The first question the Board has to consider is whether to hold a hearing. With respect to applications under section 171.1, where the Board has the power to impose a first collective agreement on the parties, the statute requires that a hearing be conducted.[197] In all other

cases, the Board has the discretion to decide whether a hearing should be held.

During the twelve months ending March 31, 1977 the Board conducted hearings in 72 of 309 cases processed, or 23%. How does this compare with other jurisdictions? The Nova Scotia Labour Relations Board conducts hearings in all cases. The Ontario Labour Relations Board during the same period disposed of 2,374 cases in 1,577 "hearing days". But the Ontario Board in non-construction cases conducts hearings in virtually all cases which reach adjudication. Quebec statistics are unhelpful. Quebec's Tribunal du Travail has statistics which do not distinguish between appeals from the decision of a Commissaire du Travail and a penal matter under the *Code*. Moreover, 60% of certifications are given by an agent d'accréditation. In British Columbia, during the same period, the Board disposed of 3,422 cases and conducted 189 hearings, roughly 5½% of the cases resulting in hearings.

Hearings are expensive and time consuming for the Board. The Board attempts to have the hearing held in the general locality of the application. This entails travel to all parts of Canada. Often travelling itself can consume a day in each direction. Proceedings are tape recorded, so arrangements must be made for travel and accommodation of Board members, Board personnel and members of the firm providing tape recording services. The Board's policy in respect of when it calls a hearing therefore bears close examination.

The policy of the Board is first to order a hearing wherever there is a serious dispute as to the facts. Therefore, most unfair labour practice complaints where the facts, if proved, would amount to a finding of a violation of the *Code* result in hearings. Secondly, the Board will conduct a hearing where an important legal issue falls to be determined. Thirdly, a hearing will sometimes be conducted where a novel issue arises and the Board wishes to use the case as a vehicle for writing a decision outlining its policy on a question. In at least one such case, the officer was advised not to attempt to mediate a settlement simply because the Board wished to use the case as such a vehicle. The present policy of the Board is not to impede settlement efforts by its officers in these circumstances. Finally, the Board has sometimes granted a hearing in a case which although it does not necessarily meet the criteria outlined above, gives to the Board an opportunity to meet the parties and become acquainted with an industry with which it has had little or no previous involvement.

It is recommended that the Board reconsider its policy in deciding whether to hold hearings. This paper has already mentioned the time and expense involved in conducting a hearing. There is another reason for re-thinking this policy. The Board has now been given more jurisdiction in the area of unlawful strikes and lockouts. Such applications require that the Board react immediately. If the Chairman and a Vice-Chairman are conducting hearings in different parts of Canada and the second Vice-Chairman is on vacation, the Board could find itself embarrassed by its inability to react immediately to a complaint of an unlawful strike or lockout.

While there is no doubt about the necessity of conducting a hearing where there is a serious factual dispute, *it is recommended that cases involving questions of law be adjudicated upon without a hearing where argument can be made conveniently and fully in writing.* The Board cannot afford the luxury of conducting a hearing merely because a novel question arises. Rather, the needs of the Board appear to dictate that the same effort be made to settle such disputes and that if a decision can be made on the basis of written submissions (and on the basis of expanded reports from officers), such a procedure be followed. But it is recognized that some applications raise legal issues of such complexity and importance that the Board will need the benefit of oral argument.

While the Board is to be commended for its efforts to hold hearings in cases where the parties are not familiar with the Board, it is felt that the holding of hearings in such cases could impede the Board in adjudicating complaints concerning unlawful strikes or lockouts.

On the other hand, the Board could hardly take into account, when deciding whether to hold a hearing, the distance involved. It appears to be essential to the principles of fairness that the decision whether to hold a hearing not depend on whether the hearing would have to take place in Whitehorse or St. John's rather than Ottawa or Montreal.

If the Board decides to conduct a hearing, the Chief of Board Services advises the parties. The Deputy Director of Administration makes the physical arrangements for travel and accommodation. One difficulty with this is that the particular officer investigating the case is not advised of the decision to hold a hearing before the parties are advised. Because of the mail service, it can happen that an angry party to the application may contact the regional officer demanding to know why a hearing has been scheduled and the officer may be in the

invidious position of not knowing that in fact a hearing has been scheduled. Moreover, the decision may be announced at a time which is insensitive to the officer's efforts to bring about a settlement. *It is recommended, therefore, that the Board contact the regional officer to announce its intentions to hold a hearing before advising the parties*. This would give an opportunity to the officer to know this in advance and, in appropriate cases, to explain to the Board why a hearing should not be scheduled at a particular juncture.

B. APPLICATIONS FOR ADJOURNMENT

Once a hearing has been scheduled, the Board is most reluctant to accede to an application for adjournment. In fact, it sometimes refuses the adjournment without consulting the other side. The Board is prepared to adjourn a hearing when a necessary person takes ill or where the parties are able to advise that they are close to settling the matters in dispute. Apart from these reasons, the Board is very resistant to such applications.

This policy is understandable. Because of the difficulties of scheduling the panel and transcribing services, together with hearing rooms, travel and accommodation arrangements, an adjournment can be expected to entail a delay of several weeks.

C. PRE-HEARING MEETINGS

The Board's policy is to schedule a short meeting with Counsel on the morning of the hearing to discuss, and possibly narrow, the issues. The Board has had considerable success in narrowing issues and in some cases settling the entire matter through the use of the pre-hearing meeting. Unfortunately, some of the benefit of settlement to the Board is lost because the panel is already there and all the arrangements are made.

If a settlement is reached after a panel has arrived in a locality, it is normally impossible to utilize the remaining days allocated there to hear some other case because of the need to give adequate notice to parties. It would be preferable to avoid an unnecessary expenditure of time and money and to employ the time thus saved to speed up the hearing of other cases. One possible solution would be to authorize the labour relations officer working on the file to conduct the meeting

before the panel has actually travelled. Examiners for the Ontario Labour Relations Board conduct hearings to take evidence and facts with respect to certification applications and are encouraged to reach settlement at all stages of their work; the work of administering the *Code du Travail* in Quebec is done by a single Commissaire du Travail. In British Columbia the vehicle of the "informal hearing" presided over by Board members or by senior industrial relations officers, is used often.

It is, therefore, recommended that the conducting of pre-hearing meetings be delegated to the Investigating Officer or, if the complexity of the issues require it, to a single member of the Board, and that the meeting be conducted several days before the hearing. Principles of fairness suggest that a Board member handling these meetings be precluded from sitting on the panel. It is recognized that settlement may not be achieved as frequently at these earlier meetings because of the unavoidable fact that the parties' legal representatives may not yet be fully familiar with the case and therefore may be less amenable to settlement. Moreover, there may be more reluctance on the part of legal counsel to have such a meeting with someone other than the Chairman or Vice-Chairman chairing the panel. Nonetheless, even if settlement is not achieved until some days after the pre-hearing meeting, that is no reason why this attempt should not be made. Parties who are not amenable to settlement earlier in the investigatory process may be more ready to do so when the deadline of a hearing is hanging over them. Even if all such efforts are unsuccessful, this does not preclude a further meeting the morning of the hearing.

D. HEARING PROCEDURE

Although the Board has the power pursuant to paragraph 117(*a*) to make regulations respecting the establishment of rules of procedure for its hearings, the regulations give one very little guidance as to the manner in which hearings are conducted. Regulations 19 to 23 merely state that the Board is under no obligation to hold a hearing,[198] the Registrar will give 10 days' notice of the hearing to the parties unless the Board directs otherwise,[199] the Board may proceed with the matter even though a person who has been given notice of the hearing fails to attend,[200] the Board may adjourn or postpone the hearing on such terms as it deems fit[201] and the Board or persons authorized by the Board may issue a summons to require a person to appear at the hearing.[202]

The Board's procedure at hearings is somewhat formal. The three panel members are present as well as a clerk to the Board. The clerk announces the case at the beginning and announces what material is in the Board's files. The proceedings are tape recorded. This necessitates a microphone in front of each person who may be called on to speak at the hearing.

In general, the Board adopts the adversary system. The person on whom the onus of proof rests proceeds to put his case in first. After a witness has given evidence in chief, the witness is subject to cross examination and, after re-examination, the Board members may ask questions. Objections made to the admissibility of evidence are duly considered, although the Board has and exercises a discretion with respect to evidence. Paragraph 118(*c*) entitles the Board "to receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion the Board sees fit, whether admissible in a Court of law or not."[203] The degree of formality is often dictated by the parties. In the first place, if neither side is represented by legal counsel, the hearing is likely to be less formal. Moreover, it is interesting to note that there are, according to one Vice-Chairman, regional disparities. His observation is that in provinces such as Ontario or Quebec where access to judicial review from the provincial labour relations board is relatively liberal, the hearing is marked by many technical objections which are made "for the record". On the other hand, in British Columbia where judicial review of decisions of the Labour Relations Board of that province is virtually non-existent, hearings are much less formal.

One immediate observation is that the presence of the clerk to the Board is unnecessary. The person chairing the panel could without difficulty perform these functions.

It would be useful to have the investigating officer who has been involved with the case attend the hearing. This would provide the Board a resource person if it appeared that an opportunity for settlement presented itself in the course of the hearing. Moreover, the officer would undoubtedly benefit from seeing this aspect of the case. *It is therefore recommended that where possible, the labour relations officer attend the hearing of the matter which he has investigated. The officer should not be a competent or compellable witness.*

Neither the *Canada Labour Code*, nor the regulations, nor the principles of natural justice dictate that the proceedings be recorded. The recording of hearings is costly in several ways. First, it contributes

to the creation of an atmosphere of formality. Such formality is doubtless inhibiting to employers' and trade unions' representatives who are not legally trained. Secondly, engaging the services of a firm to perform this function and ensure the firm's availability for the hearing date is a time-consuming task. Moreover, the lack of availability of such a service could well complicate the scheduling of a hearing. This does not appear consistent with the Board's needs in light of its expanding jurisdiction over strikes. Finally, the actual cost of engaging the service in terms of both the service itself and travel expenses is substantial.

It is therefore worth examining whether to continue the policy of recording all hearings. The only value of a permanent record is to a party to the proceedings who wishes to seek judicial review of the Board's decision. However, the grounds of review have been substantially restricted (as discussed in Chapter Four, *infra*). Moreover, a transcript is by no means essential to such an application. Facts which are not apparent from the rest of the record can be established through affidavit evidence. Labour arbitration proceedings are seldom recorded although court applications to review arbitration awards are not uncommon.

The various costs of recording proceedings do not appear to be justified by the advantage of having a transcript for judicial review. If a party wishes a transcript, for whatever reason, it would seem more sensible that it be that party which arranges and pays for it. The Board should have the power to insist that the recording be done in such a way that interference with the proceedings be minimized.

It is recommended that the Board not feel itself obliged to tape record its proceedings but permit a party to record proceedings as long as the manner of so doing were satisfactory to the Board.

E. PRELIMINARY OBJECTIONS

In many cases where the Board has ordered a hearing on the merits of an application, there are objections of a preliminary nature. For example, in an application for certification, it may be contended that none of the persons in the proposed bargaining unit are "employees" within the meaning of Part V or that the application cannot be considered because the employer is in the provincial sphere. Often a party wants the Board to rule on the objection before considering the merits of the application.

The Board's policy has been to deny such requests. The reasons for this policy are succinctly put in *Trade Locomotive Engineers – and – Canadian Pacific Limited*.[204]

> The policy of this Board to hear cases as close as possible to their respective point of origin is conducive to a better implementation of the objectives created by the code and generally to ensure that the rights of the parties are better protected. However, this policy generates the spending of funds and any abuse of the policy would not be justifiable. The setting of a hearing in Vancouver precipitated the displacement of a Board panel with supporting staff and the disbursements incurred might have been doubled if the Board had to schedule a further hearing. In this connection one must also have respect for the other parties which had also incurred heavy expenses to support the dispatching to Vancouver of the necessary representatives to fairly represent their interest.

One can readily appreciate the merits of this policy. The Board normally reserves its decision on objections of substance and eventually delivers reasons for its decision on the objection. In these circumstances the policy is a sensible one, even though it can result in a hearing of questions which may become academic if the objection is well-founded and sustained.

However, some decisions may be reserved, not because the Board is unsure of its eventual decision, but because it wishes to prepare reasons. In this regard, a recent trend has seen the Board caucusing for a short time after the objection is argued and then announcing its decision at that point. Short or no reasons may be given at the hearing. Such a policy is to be commended. Full reasons can always be delivered at a later date but in the meantime, a continuation of an unnecessary hearing is avoided.

It is recommended therefore that the Board adopt the practice, when it is able to reach a decision without reserving past the day of the hearing, of communicating that decision to the parties and preparing formal reasons, if necessary, at a later date.

F. IN CAMERA MEETINGS

Sometime after the hearing, or if no hearing has been held, when the investigation has been completed, an *in camera* meeting of the panel assigned to the case is held. As noted in Chapter Two, the statute requires that three Board members be present for such meetings and that one of those persons be the Chairman or a Vice-Chairman. These meetings are also attended by a clerk to the Board and, at times, other

Board personnel. The files are studied by the three Board members before the meeting so the cases on the agenda of the meeting can be discussed expeditiously, one by one. The Chairman or Vice-Chairman chairing the meeting gives an opportunity to the two members to express their views and a consensus is sought to be achieved. Sometimes, one of the three will have prepared a draft decision which is discussed, perhaps altered and finalized. At that point, the clerk to the Board records that fact and prepares the Order. In other cases, the Board will decide that certain information needs to be obtained from the investigating officer or that the circumstances demand that a hearing be held. In those cases, the matter is again considered at a future *in camera* meeting of the Board.

As described in Chapter Two, even the most routine applications require a decision by a quorum of Board. The Board attempts to meet these practical difficulties by dealing with non-contentious applications as quickly as possible. Moreover, if a panel of the Board is travelling to a particular locality to conduct a hearing, the panel will often take with it several non-contentious files which can be decided if there is any spare time during the trip. This practice is commendable.

G. PUBLICATION OF DECISIONS

When a decision is reached by a panel, the Order is dictated to the clerk of the Board in attendance. He then drafts the Order and sends it to the pool to be typed. The supervisor fills out a requisition for the typing and passes the Order to a typist who makes two original copies. The work is then checked by the supervisor who returns it to the clerk. The clerk takes it to be verified by the Chairman or Vice-Chairman, who affixes his signature. The clerk then sends the Order to the copy room where copies are made for the parties and for Administration. Covering letters are drafted, typed and copied and are mailed with the Order by the Registrar's secretary to the parties. The Registrar sends a copy of an Order to "Publication and Information" who photocopy it for mailing to persons on their mailing lists and retain a copy for publication in "decisions information".

All Orders and reasons for judgment are issued in both official languages. Where the Order is drafted in only one language, an original and four copies will be sent to the Supervisor of Office Services by the Registrar. The supervisor will retain the original for his records, send one copy to the assistant secretary responsible for languages and

two copies to the Translation Bureau in the Secretary of State's Department. He will fill out a requisition for the translation work and include, sometimes in consultation with the assistant secretary, an estimate of the time the translating should take. The copy and the requisition will be mailed by Administration. The assistant secretary will provide any necessary advice during the course of the translation. When it is complete, it is returned by the Board's messenger service to the supervisor, who forwards it to the assistant secretary. The assistant secretary reviews the translation and sends it to the pool to be typed. When he receives it back he takes it to the Chairman or Vice-Chairman for signature. The Order is then forwarded to the Registrar and the same steps are followed as those described for an Order in the original language. In practice the original Order is not withheld pending translation, unless serious prejudice would result from its being sent out in only one language. If the clerk is able to draft the order in both official languages then the translation and review procedure is omitted.

The same steps are followed where the decision is by letter, except that a letter decision is drafted by the Chairman or a Vice-Chairman and the typing and copying is usually done by his secretary. Moreover, as this type of decision is only for the information of the parties, no steps are taken to prepare it for publication in "decisions information".

If formal reasons for judgment are being prepared, the Chairman, Vice-Chairman or member draft the reasons. These are typed by his secretary and thereafter the same procedure is followed as that in practice with Orders.

Orders and formal reasons are sent by the Registrar to Information and Publications Services for publication in decisions information, a regular publication of the Board which is available on request at no charge. Information and Publications summarize the Orders for publication. Reasons for judgment are dispatched immediately to persons such as Chairman of provincial Labour Relations Boards. Typesetting and printing are done under an outside contract and when an edition of "decisions information" is ready, it is mailed out by Administration.

Because formal decisions are read and considered by persons in various parts of Canada, the Board makes a real attempt to consider conflicting jurisprudence from other jurisdictions in Canada in making its decision. Notably, the Board recognizes that decisions from the Province of Quebec are not translated and, therefore, not well known outside Canada. The Board will often take the opportunity to consider

Quebec decisions, in part as a means of informing the industrial relations community in English Canada that the particular subject matter has been considered by the Quebec Tribunal du Travail or the Courts.

H. CONTEMPT OF THE BOARD

The Board, as a statutory tribunal, has none of the contempt powers of a court. The Board cannot punish a person either for conduct before the Board which is contemptuous of it or for failing to comply with a Board order.[205] However, this is not to say that such conduct will go unpunished. First, a person who fails to appear at a hearing after being summoned, or fails to produce documents he has been ordered by the Board to produce, refuses to be sworn or to affirm, or to answer a proper question put to him by the Board is guilty of an offence and can be fined up to four hundred dollars.[206] Prosecution for such offences may only be instituted with the written consent of the Board.[207] Secondly, failure to comply with an order of the Board can result in proceedings under section 123 of the *Code*. Under that section the Board may file a copy of its order in the Federal Court.[208] On filing, the order is of the same force and effect as if it were obtained in the Court.[209]

V. DECENTRALIZATION OF OPERATIONS

The Canada Labour Relations Board has already established regional offices in Vancouver, Winnipeg, Toronto, Montreal and Halifax staffed with labour relations officers. We have seen that at the Vancouver regional office decentralization has proceeded much further. An important question is whether the functions of Administration, Operations and the Registry ought to be further decentralized to other regions and to a greater extent than in Vancouver at present.

What is envisaged is the entire processing of an application by the office in the region in which the application arises. The parties would deal in all matters with the local labour relations officer who has immediate knowledge of the situation and familiarity with many of the people involved. Parties are more likely to approach a labour relations officer with whom they have come into personal contact; this is especially true in the case of individual employees.

It has already been noted that simpler organizational structures and fewer people involving themselves in the processing of an application result in more rapid processing. The procedures at the Vancouver office at present are much simpler than the complex procedures at headquarters. Proceeding through headquarters' personnel to the Board, the chain of authority and communication becomes impossibly long. Postal delays incurred because all correspondence is dispatched by headquarters to the regional officer could be avoided.

Confusion and inconvenience to the parties arise from the division of responsibilities, not only with headquarters itself where the party must address himself initially to the Registrar, subsequently to Operations and finally to the Registrar, but also as between headquarters and the regional office where the parties deal simultaneously with a regional officer and the headquarters officer, and for different purposes. That correspondence is largely directed to the correct person is a tribute to the parties themselves and not to the straightforwardness of the system. Experience has shown that where a regional officer is effective and known to the parties, the parties will forward materials to him rather than to headquarters, perceiving that his continuing wider involvement is a natural one.

A major advantage of such decentralization would be that the parties would perceive the Board as more responsive to local needs. As the role of the officers expanded, they would become better known to the industrial relations community and therefore more effective.

A disadvantage to decentralization is the risk that procedures not be followed consistently. On the other hand, there are clear advantages to experimentation in a particular region: if such efforts are successful, they can subsequently be implemented throughout the system. Moreover, some would see the development of procedures suitable to local needs as an advantage. It is recognized though that a certain degree of uniformity is essential. Regular contact between regional offices and the Board itself would be necessary.

It is therefore recommended that the processing of applications up to and including finalizing of officers' reports be done in the region where the application arises. One Registry in Ottawa would continue to be the repository of the master file so that the Board members can readily determine the present status of a matter and so that hearings and in camera meetings can be scheduled from Ottawa.

CHAPTER FOUR

Review of Board Decisions

This Chapter considers the alternatives available to a party wishing to take issue with a decision of the Canada Labour Relations Board. It will discuss the law as it was until 1978, as well as the 1978 amendments to the *Canada Labour Code*.

I. INTERNAL REVIEW

The initial avenue of review available to a party from a decision of the Canada Labour Relations Board is by way of an application to the Board itself. Section 119 provides:

> **119.** The Board may vary, rescind, amend, alter or vary any order or decision made by it, and may re-hear any application before making an order in respect of the application.[210]

This method of internal review is not unique to the *Canada Labour Code*.[211] It serves the purpose of allowing the tribunal to assure consistent application of the legislative framework by its various panels of decision makers. The Supreme Court of Canada has characterized sections of this nature as grants of "plenary independent power, . . . a very necessary power to enable the Board to do its work efficiently."[212] The existence of this type of internal appeal process may also be germane to the question of what effect a Court may ascribe to provisions in the legislation, which restrict judicial review.[213]

In order to preserve the virtues of speed and finality in the administrative decision-making process, the Board has had to place some limits upon the exercise of its powers under section 119. This rationale

is apparent from the Board's decision in Canadian National Railways:[214]

> The basis for such an application for review cannot be solely that a party disagrees or is otherwise dissatisfied with an order or decision of the Board. Unfortunately, it is a well known fact that, too often, at least one party will find cause to disagree with a judgment or decision. If this sole fact provided a ground for filing an application for review, few orders or decisions of this Board (or of any tribunal) would ever be final . . . In addition, in deciding whether to grant such an application for review, the prior conduct of the applicant must be taken into account. If it was largely responsible for its own misfortune, it should normally not be allowed to ask of the Board to re-open the file at a later date. An application for review provides a means for addressing a situation or problem that could not have been foreseen or satisfactorily dealt with earlier; it cannot or should not become a means by which a party attempts to remedy its own negligence. Accordingly, in such circumstances, an application for review should allege facts or considerations that were not brought to the attention of the Board at the time it made its original order or decision and these facts or considerations should be such that, had they been known to the Board, they might have led to the issuing of a different order or decision. Furthermore, some explanation must be given for the fact that these facts or considerations were not brought to the attention of the Board when it was conducting its original investigation. The applicant for review must come to the Board 'with clean hands'.[215]

This decision also set out three recurring fact patterns under section 119: a variance to enlarge or otherwise alter the boundaries of a bargaining unit for which a bargaining agent is certified; an administrative variance to amend or clarify a certification order; and requests to the Board to review and reconsider a decision based on the assertion that the original decision is substantially wrong and should be set aside.[216]

Other decisions of the Board have placed further limits upon the use of section 119. While confirming that the Board will use the powers conferred upon it by this section to update or otherwise clarify an order or decision of the Board, the Board has indicated that it will not use this power to revive a long dead certification order by amending it and updating it, thus placing the onus on the employees in a unit to disavow the applicant.[217] The Board will not allow applications under this section which seek to expand the boundaries of a bargaining unit to sweep in previously unrepresented employees without requiring the trade union to show majority support among those employees.[218] Finally, the Board has indicated that it will not allow parties to utilize section 119 to avoid the requirements of other sections of the Code, especially when an application amounts to a request for decertification in the guise of an application under section 119.[219]

II. JUDICIAL REVIEW

A. GENERALLY

It is normally appropriate that a party utilize the internal appeal process afforded by section 119 prior to seeking judicial review of a Canada Labour Relations Board order,[220] unless the allegation is that the Board exceeded its jurisdiction and therefore that its decision is a nullity.[221]

Unlike some federal administrative tribunals, there is no appeal from the Canada Labour Relations Board to another tribunal[222] or to the Federal Court of Canada.[223] Rather, a party is limited to judicial review. The difference between an appeal and judicial review has been described in the following way:

> The principal distinction between judicial review and a general right of appeal is that in the latter case the Court may examine both the legality and merits of a decision and substitute its decision for that of the decision maker appealed from; in a judicial review proceeding the Court is limited to examining the legality of a decision and may either quash the decision or remit it back to the decidor for reconsideration in view of the Court's direction concerning the correct law or procedure.[224]

Judicial review is essentially a matter of statutory interpretation. The Court looks to the words of the statute to define the area of jurisdiction which the legislature intended to grant to the administrative entity. Until 1978 accessibility to judicial review of Canada Labour Relations Board decisions was governed by section 122 of the *Code*:

> **122.** (1) Subject to this Part every order or decision of the Board is final and shall not be questioned or reviewed in any Court except in accordance with s.28 of the *Federal Court Act*.
>
> (2) Subject to subsection (1) no order shall be made, process entered or proceeding taken to any Court, either by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board in any of its proceedings under this Part.[225]

Before the passage of the *Federal Court Act* in 1970, judicial review of decisions of the former Canada Labour Relations Board was available from provincial superior courts. The whole question of judicial review of labour relations board decisions has been the subject of much academic comment and criticism.[226] The critics have taken particular issue with certain Supreme Court of Canada decisions which they felt to be at odds with the reasons for the creation of an

administrative decision making procedure. According to this view, decisions are inconsistent with the legislative policy choice to have labour relations decisions made by those with an expertise in the labour relations field.[227] Supervision of labour relations tribunals by the Courts has thus been characterized as a form of "absentee management".[228] Criticisms from this perspective were compounded by the Courts' refusal to interpret privative clauses in labour legislation as excluding review of Labour Relations Board decisions, despite the exhaustive nature of the wording of those clauses.

With the passage of the *Federal Court Act* the review jurisdiction over federal administrative tribunals passed from the provincial superior courts to the Federal Court system, although not without some controversy.[229] The Federal Court consists of two divisions: The Trial Division and the Court of Appeal. Both of these divisions exercise certain exclusive jurisdictions in regard to the supervision of federal administrative tribunals. In the Court of Appeal, this jurisdiction over administrative tribunals is in addition to the normal jurisdiction to hear appeals from the Trial Division.[230] Decisions of the Federal Court of Appeal may be appealed to the Supreme Court of Canada with the leave of the Court of Appeal,[231] or if the Supreme Court feels the appeal involves a question of public importance.[232]

While there has been exhaustive comment regarding the interplay of the jurisdiction of the Trial Division and the Court of Appeal,[233] the grant of jurisdiction which is of most concern regarding decisions of the Canada Labour Relations Board is contained in subsection 28(1) of the Act. This section provides:

> Notwithstanding Section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a Federal Board, commission, or other tribunal, upon the ground that the Board, commission or tribunal
>
> (*a*) failed to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction;
>
> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The Federal Court itself has indicated that its jurisdiction under section 28 is broader than that of the common law courts and that the Court

"is not limited to dealing with points of law which would be open if this proceeding were by way of certiorari".[234] However, recently the Court has expressed the opinion that it would find it difficult to conceive of a decision that could be set aside under paragraph 28(1)(*c*) that would not have been subject to being set aside under either 28(1)(*a*) or 28(1)(*b*).[235]

The opening words of section 28, "Notwithstanding . . . the provisions of any other Act" nullify the effect of existing privative clauses in Federal legislation insofar as review under section 28 is concerned. This is to be contrasted with the approach of provincial superior courts. Those courts respected privative clauses at least to the extent that they confined judicial review to cases where there was found to be a jurisdictional error.[236]

The other avenue of review under the *Federal Court Act* is section 18:

> **18.** The trial division has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus*, or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission, or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Early decisions held that if review of the final decision or order of a tribunal lay with the Court of Appeal under section 28, then the jurisdiction of the Trial Division was ousted over the whole of the proceedings, including interlocutory proceedings.[237] However, as was pointed out in a recent study by the Law Reform Commission of Canada,[238] these decisions are now regarded as aberrations. It is effectively settled that the Trial Division has jurisdiction over interlocutory proceedings even where the jurisdiction for review of the final operative decision lies with the Court of Appeal.[239]

Notwithstanding the privative clause in subsection 122(2) of the 1972 *Code*, the Trial Division has held that it had jurisdiction to proceed under Section 18 against the Board. In *British Columbia Packers Ltd. v. Canada Labour Relations Board*[240] Mr. Justice Addy had this to say about the effect of subsection 122(2):

> In my view, there is nothing extraordinary in this privative clause contained in the *Canada Labour Code*.

> There are numerous decisions of common law courts of the highest jurisdiction over many years which have held that courts of superior jurisdiction possessing powers of prohibition and entrusted with the duty of supervising tribunals of inferior jurisdiction, have not only the jurisdiction but the duty to exercise those powers notwithstanding privative clauses of this nature where the application is based on a complete lack of jurisdiction on the part of the tribunal of inferior jurisdiction to deal with the matter with which it purports to deal. These decisions are based on the very logical assumption that where Parliament has set up a tribunal to deal with certain matters it would be completely illogical to assume that, by the mere fact of inserting a privative clause in the Act constituting the tribunal and outlining its jurisdiction, Parliament also intended to authorize the tribunal to deal with matters with which Parliament had not deemed fit to entrust it or to exercise jurisdiction over persons not covered by the act of Parliament, or to engage in an illegal and unauthorized hearing.[241]

The Courts have been quite circumspect in regard to the question of whether the Board must hold a hearing as a condition precedent to making an Order. The decisions have consistently held that as long as parties are given full opportunity to present their case,[242] the lack of an oral hearing does not vitiate the Board's decision.[243]

With a few notable exceptions, the Courts have not interfered with the substantive administration of the *Canada Labour Code*. For example, they have held that a decision of the Board to hold a representation vote is a decision of an administrative nature, not reviewable under section 28,[244] and that the determination of whether a person is an employee and therefore included within the union's bargaining unit is a question of fact for the Board.[245] The Board's determinations of its constitutional competence in regard to certain employers have not been subject to sweeping review.[246] As well, it has been held that a preliminary decision of the Board that it has constitutional jurisdiction over an employer does not constitute a final decision within the meaning of section 120.1 and is therefore not subject to review under section 28.[247]

However, as indicated, certain decisions of the courts have been criticized as showing an insensitivity to prevailing labour law practice throughout the country. In *Central Broadcasting Co. Limited*[248] the Supreme Court of Canada disagreed with the Board's holding that the burden of proof in a case where termination for union activity was alleged, is on the employer. The Board had relied on subsection 188(3) of the *Code*:

> **188.** (3) A complaint in writing made pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with paragraph 184(3)(*a*) is evidence that the employer or person has failed to comply with that paragraph.[249]

The Court took a very restricted view of the meaning of this section. It was not persuaded by previous decisions regarding similar, though not identical, language in other statutes which explained that such a reversal of onus was necessary because an unfair labour practice case revolves around the employer's subjective motivation. Since that motivation is known only to the employer, it has been deemed necessary for certain inferences regarding that motivation to arise from the mere existence of the fact of discharge during union organizational efforts.

In *CKOY Limited*[250] the applicant employer attacked the Court's policy of focusing on the date of the application in determining the majority status of a trade union upon an application for certification. The applicant relied on paragraph 126(*c*):

> **126.** Where the Board . . .
> (*c*) is satisfied that a majority of employees in the unit wish to have a trade union represent them as their bargaining agent,
> the Board shall, subject to this part, certify the trade union making the application as the bargaining agent for the bargaining unit.[251]

The Federal Court of Appeal held that "under the wording of paragraph 126(*c*) the required date for determination of the majority is the date the decision to certify is made".[252] The Court made this determination in the face of previous statements by the Board of the rationale behind making the date of application the relevant date for determination of majority status: the need to protect employees from attempts by their employer to influence their wishes regarding trade union representation.

The Courts have also taken a very firm view regarding the right of the Board to appear and present argument when a party seeks judicial review of its decision. In *Transair Ltd.*[253] the Supreme Court of Canada held that the Board is entitled to contest any challenge to its jurisdiction. However, this case left open the question of whether an allegation of a breach of the rules of natural justice is an allegation of a jurisdictional error which would then allow the Board the right to participate in review proceedings.[254] Any debate regarding that question is resolved by the decision in *Northwestern Utilities Ltd.*,[255] where Mr. Justice Estey of the Supreme Court of Canada said:

> In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed

to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.[256]

Thus, it is now clear that the Board's right to appear as a party to an application for judicial review of a decision of the Board is very limited.

B. THE 1978 AMENDMENTS

The 1978 amendments[257] to the *Canada Labour Code* have affected judicial review in several ways. First, Parliament has expressly reversed the decision in *Central Broadcasting Co. Ltd.*[258] by amending subsection 188(3) to read as follows:

> **188.** (3) Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 184(3) the written complaint is itself evidence that such failure actually occurred and, *if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party*.[259]

Secondly, the amendments specifically counter the decision in *CKOY Limited*[260] by amending paragraph 126(*c*) to read as follows:

> **126.** Where the Board . . .
> (*c*) is satisfied that as of the date of filing of the application, *or of such other date as the Board considers appropriate*, a majority of the employees in the union wish to have the trade union represent them as their bargaining agent,
> the Board shall, subject to this part, certify the trade union making the application as the bargaining agent for the bargaining unit.''[261]

More significantly, Parliament has put a unique limitation on judicial review of Canada Labour Relations Board decisions. Section 122 was amended to read:

> **122.** (1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any Court, except in accordance with paragraph 28(1)(*a*) of the *Federal Court Act*.
>
> (2) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part shall be
>
> (*a*) questioned, reviewed, prohibited or restrained, or
>
> (*b*) made the subject of any proceedings in or any process of any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise,

on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction.[262]

The first effect of this amendment is to restrict judicial review of Canada Labour Relations Board decisions to section 28 of the *Federal Court Act*.

The first application under section 18 after proclamation of the amendments was made in *CJMS Radio Montréal (Québec) Limitée v. Conseil Canadien des Relations de Travail*.[263] This was an application to prevent the Board from proceeding with an application to impose a first collective agreement under Section 171.1 of the *Code*. Mr. Justice Walsh considered the amended section 122 and commented:

> It is evident that the new section which applies in the present case goes much further in that it restricts the right to review decisions of the Board to paragraph 28(1)(*a*) of the *Federal Court Act* rather than the whole of s.28, and, moreover, prohibits the use, *inter alia*, of writs of prohibition against the Board on any ground including jurisdiction.
>
> It should be pointed out that not only is this particular legislation as opposed to the general legislation of the *Federal Court Act* which in s.18(*a*) gives the trial division jurisdiction over writs of prohibition against any federal board, commission or other tribunal, but it is also subsequent legislation, and must prevail unless such legislation was *ultra vires* the powers of the federal Parliament.[264]

He went to hold that section 122 was *intra vires* the Parliament of Canada and that:

> . . . if full effect is given to it it must be concluded that no writ of prohibition can be granted to the Petitioner against the Respondent even if it were exceeding its jurisdiction in arranging to conduct the inquiry and establish the terms of a collective agreement between Petitioner and the Syndicat representing its employees.[265]

The second effect of the amendments to section 122 is to cut down substantially on the grounds for review available under section 28 of the *Federal Court Act*. The Board cannot be reviewed on the basis of error of law so long as the Board does not act beyond or refuse to exercise its jurisdiction. In addition, it is no longer a ground of review that the Board made an erroneous finding of fact in a perverse or capricious manner.

The Federal Court of Appeal has not had to consider the words "acted beyond or refused to exercise its jurisdiction" which appear in paragraph 28(1)(*a*). It has instead been sufficient to find that a tribunal

has simply erred in law. The full effect of the amendments will not be known until the Federal Court of Appeal has had the opportunity to consider section 28 applications from Canada Labour Relations Board decisions.[266]

III. MERITS OF RESTRICTING ACCESS TO JUDICIAL REVIEW

In considering the performance of the Federal Court in the area of judicial review, David Mullan made the following comments:

> Basically, the Court has been very traditional in the way it has outlined the principles of judicial review. No great development in the substantive law of judicial review can be attributed to the Court in the six years of its existence, except perhaps the Court's approach to claims of confidentiality by Federal statutory authorities. As a result, there seems to be no immediate need to redefine the grounds of judicial review in s.28 in order to correct aberrations. There really have been none . . .[267]

Despite this assessment of the Court's performance, the amendment to section 122 of the *Code* is a significant restriction of the Court's review jurisdiction over the Canada Labour Relations Board. As such, it represents a recognition by Parliament that the Canada Labour Relations Board is somehow different from all other federal boards, commissions or other tribunals in that it should be protected from judicial review.

According to one writer:

> There is no real debate over the issue of whether or not decisions of administrative authorities should be subject to a sober second look. It is an entrenched value in our legal system that citizens whose rights or liberties are altered by decisions of the state should have a "real" opportunity to challenge any errors which they think the initial decidor has made. Rights of appeal are granted in civil and criminal proceedings for the simple reason that our notions of justice demand a procedure whereby errors and miscarriages can be corrected. Errors and miscarriages are not confined to civil and criminal proceedings; they frequently occur in the administrative process, where the claims of justice are no less demanding.[268]

While that is true in general, there is just such a debate over judicial review of labour relations tribunals.[269]

An articulate spokesman for those who oppose judicial review of labour relations boards is Paul C. Weiler, until 1978 the Chairman of

the British Columbia Labour Relations Board. Professor Weiler had the opportunity to administer a labour relations statute with the following privative provisions:

> **33.** The Board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, . . . and to determine any fact or question of law that is necessary to establish its jurisdiction, and to determine whether or not or in what manner it shall exercise its jurisdiction.
>
> **34.** (2) Except in respect of the constitutional jurisdiction of the Board, a decision or order made by the Board under this Act . . . upon any matter in respect of which the Board has jurisdiction, or determines under s. 33 that it has jurisdiction under this Act . . . is final and conclusive and not open to question or review in any Court on any grounds . . .[270]

Professor Weiler makes the following arguments in favour of such protection:

> (a) The labour relations board is best qualified to make the final judgment about the administration of labour legislation. It has expertise, sensitivity to labour relations issues, and since it specializes in the area, the ability to see issues as part of an integrated whole. On the other hand, the nature of judicial review dictates that the intervention of Judges is occasional and cursory: "they only see that segment of the legal area exposed by the dispute which happens to go to Court."[271]
>
> (b) When a legislature has developed an elaborate administrative scheme to handle disputes, it is inconsistent with this that one party be permitted to circumvent this procedure by unilaterally moving the dispute into Court.
>
> (c) A middle ground is not practical. For example, some observers propose that while the Courts should not consider the merits of a case, they should be able to supervise a board's determinations as to the extent of its jurisdiction. (This approach appears to have been adopted in the 1978 amendments to the Canada Labour Code.) Professor Weiler's response is this:
>
> > Who will interpret the statutory language which restricts the Courts to this specialized role in the legislative scheme? The Courts, of course. But how can a Court be trusted to interpret and apply the legal language which is designed to cabin and confine their own jurisdiction? Is there not a natural human tendency for Judges, perhaps strongly moved by what they perceive as an injustice in a particular case, to step beyond the proper scope of their own authority, and start down the slippery slope of total judicial oversight? Judges are as human as administrators and it is a jurisprudential fallacy, as patent logically as it is ignored politically, to equate the "rule of law" with rule by Judges.[272]

The arguments can really be summarized this way: finality is essential in labour relations adjudication. The mere availability of judicial

review destroys that attribute. Whether application to the Courts is successful may well be academic if the purpose of the application was delay. Since someone must have the final say, why should it be the Courts in preference to a specialized board, headed by a legally trained chairman, and having amongst its members representatives of the union and management, a board whose judgments may in any event be reversed by the legislature?

Further support for Professor Weiler's arguments regarding the need to restrict judicial review of labour relations board decisions can be had by reference to a American perspective of Canadian legal traditions in this regard. In *The Labor Relations Law of Canada*[273] a book prepared by the labour relations section of the American Bar Association, the authors comment:

> The Supreme Court of Canada appears to view its primary function as that of adjudicating specific issues raised by particular disputes, without articulating legal principles of general application or formulating judicial doctrines which can be followed in future cases. It has been suggested that if Canada's Supreme Court agrees with a particular Labour Board decision, based upon its evaluation of the peculiar equities of that particular case, it will tend somehow to conclude that the Labour Board decision is unreviewable. If it disagrees with the Labour Board decision, because of its concern for the equities of that particular case, the Courts tendency is somehow to conclude that the Labour Board decision is reviewable and quash it. This judicial approach, which characterizes Labour Board decisions as reviewable simply because the Court disagrees with the Board as to the merits of the particular case, provides little in the way of intelligible principles upon which future decisions can be shaped and future conduct planned. The Supreme Court of Canada thus has deprived itself of the ability to channel the behaviour of the lower Courts and administrative agencies along the lines of its own basic judgments, and has seemingly neglected to elicit their collaboration in refining its doctrine in the light of the experience they obtain in following them.[274]

The arguments for unlimited judicial review, with no distinctions drawn between particular administrative agencies, proceeds from a different perspective. The advocates of this position focus on the right of citizens to challenge decisions of tribunals and Courts as "an entrenched value in our legal system".[275] These comments of an observer in the United States are probably of equal force in Canada:

> The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid . . . There is in our society a profound tradition taught reliance on the Courts as the ultimate guardian and insurer of the limits set upon executive power by the constitutions and legislatures.[276]

This reliance is met only in part by making provision for appeals to the tribunal itself. Even if the Board has established an elaborate system to ensure appeals are heard entirely independently, it is simply not the same as review by an external body.

How do these arguments impact upon the approach taken by the recent privative enactment in the 1978 amendments? In commenting on privative clauses, the Law Reform Commission of Canada states in its Working Paper entitled *Federal Court: Judicial Review* that it does not believe judicial review should be arbitrarily restricted;[277] but in my view the arguments against judicial review of labour relations boards justify at least the degree of autonomy which has now been accorded to the Canada Labour Relations Board by the 1978 amendments. However, until there has been a full opportunity to see the effect of the 1978 amendments on the approach of the Federal Court to review applications, no further amendments should be considered.

In any event, the nature of judicial review of the Board may well alter as a result of judicial developments. A recently evolving judicial tendency is to pay particular attention to the procedural rights accorded to persons appearing before administrative tribunals.[278] Courts in Canada may be withdrawing from full fledged judicial review of matters of jurisdiction and confining themselves more to a consideration of whether there is a "rational basis" for the judgment of an administrative tribunal.[279] This type of approach is encouraging: it allows the Courts to take a functional view of issues and resolve questions of entitlement to review by reference to the relative competence of the Court and the tribunal involved. This type of sensitivity to the underlying rationale of administrative decisionmaking would eliminate the expensive and time consuming process of legislative amendment as a cure for Court intervention into areas properly the domain of the tribunal concerned.

In one respect, the recent amendments have not gone far enough. The legislation should have specifically provided for the Board to have standing on any application for review. The amendments to the privative clause in the *Code* have recognized the unique problems of labour relations law and it seems only logical that this recognition extend to the question of the tribunal's standing before a court on review proceedings. From a practical viewpoint one would think that a court would wish to know the reasons underlying a tribunal's position on a particular matter. This is especially so now that review is confined to essentially procedural matters which may give rise to a complaint that the rules of natural justice have been breached. It seems unfair to

place the burden of justifying the Board's procedure on the respondent to a review application. Further, the Court would obviously receive a more detailed and sensitive elaboration of the procedural needs of the tribunal from counsel instructed by the tribunal. Furthermore, if there is to be any movement towards the "rulemaking" function by the Canada Labour Relations Board, the tribunal whose rule is under attack would be the only logical candidate to elucidate the concerns lying behind the rule.

It is recommended that, because of the special status of the Board regarding judicial review, the Code be amended to provide that the Board is a party to and may participate in any proceeding in respect of the Board under section 28 of the Federal Court Act.

CHAPTER FIVE

Accountability

This Chapter is a consideration of the relationship of the Canada Labour Relations Board with other parts of the government, with the media and with the public.

I. RELATIONSHIP WITH GOVERNMENT

A. THE PRIVY COUNCIL

The Chairman, the Vice-Chairmen and members of the Board, while appointed for a fixed term[280] by the Governor-in-Council are subject to performance appraisal. The Committee of Senior Officials, made up of eight Deputy Ministers consider evaluations made of Governor-in-Council appointees. The Chairman of the Board prepares the evaluations of the Vice-Chairmen and members on forms provided by the Secretariat to the Committee of Senior Officials.

These evaluations are for the purpose of determining whether persons should be re-appointed and whether they should be considered for more senior positions with the Board or elsewhere in the public service.

The Chairman is evaluated by the Minister of Labour. These evaluations are part of the consideration in re-appointment.

The Committee of Senior Officials is encouraging persons involved in evaluating to discuss the appraisals with those evaluated. The practice of the Canada Labour Relations Board Chairman is to have such discussions when requested.

Although it is a legitimate function of the government to appraise the performance of those whom it appoints, one expects that such appraisals are prepared cautiously and used judicially. It is important that a quasi-judicial body, such as the Canada Labour Relations Board, not appear to be under any pressure of adverse appraisal when it may have to consider rendering decisions adverse to the government.

B. TREASURY BOARD

The Treasury Board exercises the same control over the Canada Labour Relations Board that it does over most other departments and agencies. The Canada Labour Relations Board provides materials upon which performance measurement may be based for inclusion in the report of the Minister of the Treasury Board. For this purpose, the Canada Labour Relations Board has assigned a clerk to measure performance in the disposition of cases. The Secretariat has no previous experience in measuring the performance of an administrative tribunal.

C. MINISTRY OF LABOUR

The Canada Labour Relations Board functions separately from the Ministry of Labour. A deliberate effort has been made by the Board to keep its distance from the Ministry. The Board naturally considers it important not to be perceived as a branch of government so much as an independent, quasi-judicial board. In fact, in only one case has the Board been aware of the views of the Minister of Labour on the case and there the Board's eventual decision was contrary to that view.

However, there are many informal contacts between the Ministry and the Board. When an application for certification is received by the Board, it contacts the Ministry as a matter of course to see whether there is already a collective agreement affecting the persons in the proposed bargaining unit. If there is complaint of an unlawful strike or lockout, there is communication with the Department to determine whether a conciliation officer has been appointed or whether a conciliation board is going to be appointed. If a newly-certified union is in the course of bargaining and there are unsettled unfair labour practices, the Board encourages the conciliation officer to settle those unfair labour practices during the course of negotiations. Moreover, there is weekly contact with the Arbitration and Conciliation Branch con-

cerning any complaints that are related to collective bargaining. All Canada Labour Relations Board Orders and reasons are forwarded to the Ministry of Labour. In general, there appears to be considerable discussion on matters of mutual interest, on an informal level.

As described in Chapter One, the Board now has the jurisdiction to impose a first collective agreement.[281] In such applications, the role of the investigating officer will no doubt include making efforts to bring about a settlement which in this case would be a collective agreement. Since it is likely that the applicant will have already tried conciliation procedures under the *Code*, it will be necessary for the Board and the Conciliation Branch to exchange information and work together toward any settlement of such applications.

There is also contact at the regional level. For example, a person who is unfamiliar with the process may come to a Canada Labour Relations Board office with a complaint which should be made to the Department of Labour. The opposite may also happen. Both offices cooperate in directing persons to the correct office. For example, the Canada Labour Relations Board has only one office in the Atlantic provinces. Labour Canada has offices in Fredericton, Moncton and St. John's as well as Halifax. When a person approaches a Labour Canada office in one of those cities with a problem which should be dealt with by the Canada Labour Relations Board, the regional officer of the Board is contacted who will in turn advise the Labour Canada official how to explain to the member of the public how to deal with the problem.

II. RELATIONSHIP WITH MEDIA

The Board clearly has an interest in fair reporting of its decisions. This is one of the concerns of the Board's Information Officer. Journalists are permitted to attend hearings, although they are not permitted to take photographs or taperecord the proceedings. When important decisions are accompanied by extensive reasons, a summary of those reasons is provided by the Board to the media. When the Board releases a decision to the press, it also provides the decision to the media in the locality where the application arose.

The quasi-judicial body must always consider its position when it is criticized in the media. The courts do not answer such criticism.

Other government bodies sometimes do. The Canada Labour Relations Board has chosen the former course. However, the Board has made one notable exception to this policy. When the *Financial Post* reported that some members of the Canadian banking community contended that the composition of the Board was "stacked" in favour of labour union interests,[282] the Chairman wrote to the newspaper and defended the Board, remarking in particular that some key members of the Board had formerly been in private practice representing the interests of management in labour relations matters.[283]

III. RELATIONSHIP WITH THE PUBLIC

The Board considers employers and trade unions in industries in the federal sector to be its "clientele". Much of this study is a consideration of the Board's effectiveness in meeting the needs of these two groups. But the Board's work also has an impact on the interest of the public in general and particularly on individual employees.

The public has an enormous stake in peaceful labour relations — whether it is the provision of airline services which is at stake or the economic and social effects on a mining community in the Yukon of a prolonged labour dispute at the mine. The Board has not yet experienced the public demand for participation in its proceedings that has been experienced by the National Energy Board and the Canadian Radio-television and Telecommunications Commission. The Board's policy to date has been liberal in permitting persons other than the immediate parties to an application to participate in its hearings.

The interests of the individual employee are not always represented by his union or his employer. He may be part of a vocal minority who opposes certification; he may feel he has been treated unfairly by his union; he may not have union representation but alleges employment discrimination by his employer because of his efforts to form a union.

Common characteristics of such employees are lack of familiarity with the Board's procedure and a lack of resources necessary to engage legal counsel. Legal aid programmes are not uniform across Canada.

The Board tries to meet this challenge in a number of ways. First, the regional officers of the Board render assistance. They often assist employees in the preparation of complaints or applications to the Board. Through the investigatory process, officers seek to determine whether such complaints are well founded; where possible the officer attempts to obtain a settlement satisfactory to the individual. Where a matter is not settled, the Board in adjudicating does not demand a sophisticated presentation expected from those familiar with the Board.

However, there are real limits to the effectiveness of such efforts. The Board and its members must after all remain neutral.

In such cases there is a useful role for Board Counsel. *Where the complaint of an individual, unrepresented by counsel, is the subject of a hearing, it is recommended that Board Counsel take an active part at the hearing. His role would include the adducing of evidence relevant to the complaint and the presentation of relevant legal materials.*

Another concern is with cases which never reach the Board. Individuals may not be familiar with the protections available to them under Part V. The Board has published a booklet entitled "How to File a Complaint of Unfair Labour Practice with the Canada Labour Relations Board" but it is out of date, both in describing substantive provisions of the *Code* and in describing the procedure to be followed.

It is recommended that the Board prepare an up-to-date publication advising individuals of their rights under the Code and that efforts be made to put such a publication in the hands of employees in the federal sector.

IV. RULE MAKING

Normally, administrative tribunals develop their policies on a case-by-case basis. For example, in Chapter Four, one can observe the Board's case-by-case elaboration of its perspective of the proper use of section 119 of the *Code*. This approach to policy development has been criticized as allowing the tribunal to escape accountability for the policies so developed and excluding the public from the

decision-making process.[284] Further, this approach does not allow those affected by the exercise of authority by an administrative tribunal to anticipate the probable resolution of a case they might put forward. In this form, the development of policy is entirely retrospective.

The United States has sought to remedy these defects with the passage of the *Administrative Procedure Act*.[285] One of the systems available under this legislation is known as "rule making". It may be simply described as follows:

> . . .The central feature is publication of proposed rules, with an invitation to interested parties to make written comments. The agency's staff then sifts the comments and revises the rules. Then the rules are published but do not become effective for thirty days after publication;
>
> protests can thus be directed to the final version. The procedure is both fair and efficient. Much experience shows it works beautifully. Good agencies are more and more tending to use this rule making procedure even when they are not required to.[286]

This approach is commendable. By its prospective nature it invites public participation. More importantly, if those who are to be affected by the exercise of a tribunal's authority have a part in the formulation of procedures which will structure the exercise of a tribunal's discretion, then decisions rendered by that tribunal which affect these parties will have more general acceptability.

However, Canadian administrative tribunals are arguably restrained by common law from doing this. A tribunal is confined to taking into account only those things which it has the legislative mandate to take into account. It would be an "abuse of discretion" for a tribunal to take into account matters which it ought not to take into account, or, conversely, refuse to take into account or neglect to take into account matters which it ought to take into account.[287] Although the courts have interpreted "abuse of discretion" very widely, this approach has been criticized as ineffective in curtailing the arbitrary exercise of discretionary powers.[288]

Although there has been a tentative move towards rulemaking in British Columbia,[289] the approach taken there is less than satisfactory since it is left to the tribunal's discretion as to whether to seek submissions from the public.[290] *It is recommended that the Board be given the power to make prospective rules and be required to seek public input into such rule making.*

CHAPTER SIX

"Policy" in Decision Making — The Appropriate Bargaining Unit

The Canada Labour Relations Board in deciding cases and interpreting the provisions of Part V, applies not only legal principles but also social policy. In this respect, it is no different from other labour relations tribunals in Canada or, for that matter, other Canadian administrative tribunals. The Privy Council recognized this in calling a common characteristic of administrative tribunals the fact that ". . . the ultimate decision may be determined not merely by the application of legal principles to ascertained fact but by considerations of policy also."[291] Nowhere have these policy choices been more clearly expressed than in Board determinations of the appropriate bargaining unit.

Section 118 empowers the Board to determine whether any proposed bargaining unit is appropriate:

> **118.** The Board has, in relation to any proceeding before it, power . . .
>
> (*p*) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether . . .
>
> (v) a group of employees is a unit appropriate for collective bargaining.[292]

The Board has, in two different kinds of situations, exercised this power in a manner which clearly identifies the policies which it adopts. The first kind of case is where a trade union seeks to replace a certified bargaining agent for part of an existing bargaining unit. In other words, it seeks to carve out a smaller unit from the existing one.

In *Trade of Locomotive Engineers — and — Canadian Pacific Ltd.*,[293] the applicant sought to represent a small western portion of a

national bargaining unit affiliated with the Brotherhood of Locomotive Engineers. It was alleged by the applicant (although very little evidence was adduced) that the different terrain in the area called for particular and unique skills and further, that the employees in the proposed bargaining unit had no effective voice in the national affairs of the incumbent union. Significantly, the applicant had the support of a majority of the employees in the proposed bargaining unit. The application was opposed by both the employer and the incumbent on the grounds *inter alia* that the proposed bargaining unit was inappropriate.

The Board agreed with this contention and in extensive reasons outlined the policy considerations dictating its conclusion. It began its analysis by pointing out that the purpose and intent of the legislation is to promote on the one hand "the concepts of freedom of association and collective bargaining"[294] but also to respect on the other hand "long range objectives of a healthy collective bargaining system".[295] These objectives were stated to include minimum disruption for the employer and the creation of an atmosphere conducive to cohesion and the swift attainment of a collective agreement.

The Board concluded that the ideal bargaining unit was one consisting of all employees of a particular employer. In support of its conclusion, the Board cited the reasoning of the British Columbia Labour Relations Board in outlining the advantages of large bargaining units:[296]

(i) administrative efficiency and convenience in bargaining;
(ii) such units are more conducive to the lateral mobility of employees;
(iii) it is easier to attain a common framework of employment conditions; and
(iv) it is more conducive to industrial stability — a multiplicity of bargaining units will mean several sets of negotiations and a higher risk of strikes.[297]

In the case before it the Board found no reasons in the evidence to justify a departure from this policy of favouring large bargaining units. The application was dismissed.[298]

The second kind of case is where the trade union seeks certification for a proposed bargaining unit which is a small portion of the employees of an *unorganized* employer. This was squarely before the Board in *Service, Office and Retail Workers' Union of Canada — and — Canadian Imperial Bank of Commerce*.[299] The applicant sought separate certification on an individual branch basis for several small branches of the respondent bank.

The bank took the position that the bargaining units proposed were not appropriate. It argued that the only appropriate unit was all employees of the bank. It cited the rationale outlined above. As the Board put it:

> It requests this unit in the interest of administrative efficiency and convenience in bargaining, administrative convenience for lateral mobility of employees in a large unit, the desirability of common employment conditions, and a reduction of the potential incidents of industrial unrest.[300]

The bank argued that branch certification was contrary to the public interest and would create "utter chaos".[301]

The respondent was also able to rely on a 1959 decision of the former Canada Labour Relations Board, *Kitimat, Terrace and District General Workers' Union, Local Number 1583 — and — Bank of Nova Scotia, Kitimat*.[302] There, the applicant union had sought certification for employees in a single branch of the Bank of Nova Scotia. The Board, in that case, after considering the degree of transferability and the fact that the Bank's 503 branches were operated on an integrated nationwide basis, concluded that the proposed bargaining unit was inappropriate.

But in *Canadian Imperial Bank of Commerce*[303] the Board was not persuaded by these arguments yet acknowledged the general policy. The Board pointed to the preamble to Part V of the *Code*:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations; . . .
>
> And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;

It examined the process of unit determination in the larger context of the duty the Board must discharge:

> . . .The fundamental dilemma the Board confronts in each certification application and bargaining unit dispute is that the bargaining unit serves two basic purposes. It is the initial constituency which will decide

whether an applicant union will acquire representational rights to commence collective bargaining. It is also the basis for the bargaining structure that may obtain in the future. This Board and other labour relations boards recognize that in difficult cases, such as this one, any judgment carries its cost. The freedom of choice of employees to group into self-determined units or the most rational, long-term bargaining structure is partially or totally sacrificed.[304]

It concluded:

> The express intention of Parliament is the "encouragement of free collective bargaining" and to support labour and management who recognize and support collective bargaining "as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations". Parliament also "deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all"..
>
> This legislative intent can best be achieved by facilitating collective bargaining for employees who choose this procedure for setting their terms and conditions of employment. That can be accomplished by this Board accepting or fashioning bargaining units that give employees a realistic possibility of exercising their rights under the Code. Too large units in unorganized industries will abort any possibility of collective bargaining ever commencing and defeat this express intention of Parliament. At the same time, this does not mean the Board will or should create artificial units based on extent of organizing. This would ignore the purpose of the Board's role.[305]

As to the decision of the former Board in *Bank of Nova Scotia, Kitimat*[306] the Board pointed out that in the eighteen years since that case was decided, only two applications for certification had been received. This demonstrated to the Board's satisfaction that:

> . . . bank employees and trade unions realistically perceived that any form of union organizing was virtually impossible on any basis other than the branch basis.[307]

How are the Board's decisions in *Trade of Locomotive Engineers* and *Canadian Imperial Bank of Commerce* consistent? The Board balances the competing interests of employee freedom of association and employer need for large stable units in the following way. The Board in most cases opts for the latter choice, especially in the public sector or where the employees have already achieved collective bargaining rights with their employer but wish to replace the incumbent in a carved out portion of the existing unit. But a principal exception to this policy choice is made where the employees in a specific industry have difficulty achieving collective bargaining rights. The Board has cited with approval the following statements in a British Columbia case:

> However, clearly one cannot have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stimulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.[308]

In this latter situation, the Board's policy choice is in favour of employee freedom of association, even though this could result in a multiplicity of bargaining units. However, the Board has also stated that in such circumstances it will "monitor" the growth in the bargaining unit and in due course ". . . may consider what small existing units must be enlarged or amalgamated and will take an active part in that process".[309]

The way in which the Canada Labour Relations Board has fashioned principles from the intent of Parliament and applied them to specific fact situations illustrates a key reason for assigning the adjudication of such questions to an administrative tribunal composed of members experienced in labour relations and aware of the competing interests. While specific groups may disagree with the policy choices made, the decisions discussed are an express consideration and application of policies contained in the legislation. The Board, in giving extensive reasons, demonstrates its function of *lawmaking* in addition to its function of *adjudicating* on the specific disputes between the immediate parties.

Summary of Recommendations

1. The *Canada Labour Code* should be amended to provide for a larger number of members, consisting of equal representation from management and the labour movement. It is further recommended that the present prohibition against earnings from other sources be abolished for part-time members.

2. The *Code* should be amended to provide that the Chairman or a Vice-Chairman can constitute a quorum for the purpose of adjudicating on certain matters, such as in the case of an unopposed application, or where relief is requested from a lockout or an unlawful strike.

3. The Chairman should be provided with one person responsible for the administration of the Board. The functions of such a person would include the devising of an organization which is particularly suited to the needs of the Board. His position should be a senior one. His would be the responsibility for continual monitoring and evaluation of the effectiveness of the existing organization; if changes were made, they would be in response to the overall work flow of the Board. He would establish guidelines as to the deadlines to be met in respect of all phases of the processing, including the drafting and issuing of decisions, to meet the requirements for rapid processing. To that extent he would be monitoring applications even when they are in the care of a Vice-Chairman, awaiting decision.

4. An immediate recommendation is the unification of the tripartite divisions of Administration, Operations and Registry into one Secretariat to serve the Executive. The person in charge of this Secretariat could proceed from this point to re-organize a more simple, flexible division of responsibility within this framework.

5. When an application is received by the Board's Ottawa office, a particular officer should be immediately designated to deal with it. This officer should have overall responsibility for opening a file, checking or vetting the application, preparing the routine correspondence and documentation in connection with it and dispatching the necessary material to the regional labour relations officer. It is also recommended that this officer sign the correspondence to the parties.

6. The Board should increase its efforts to use its officers to achieve settlements.

7. The *Code* should be amended to permit the Board to consider the officer's report without disclosing its contents to the parties.

8. The Board should adopt a policy of accepting as appropriate a bargaining unit agreed upon by the parties unless excluded employees object or unless the unit is in the Board's view wholly inappropriate. In other words, the fact that the parties agree on the bargaining unit should create a very strong presumption that the unit is appropriate.

9. The Board should always issue reasons to the parties when it determines that an agreed upon bargaining unit is inappropriate.

10. The Board should adopt a policy of granting applications to withdraw unfair labour practice complaints where settlement is achieved through the efforts of its officers.

11. The Board should reconsider its policy in deciding whether to hold hearings.

12. Cases involving questions of law should be adjudicated upon without a hearing where argument can be conveniently made in writing.

13. The Board should contact the regional officer to announce its intentions to hold a hearing before advising the parties.

14. The conducting of pre-hearing meetings should be delegated to the Investigating Officer or, if the complexity of the issues require it, to a single member of the Board, and the meeting should be conducted several days before the hearing.

15. The labour relations officer should, where possible, attend the hearing of the matter which he has investigated. The officer should not be a competent or compellable witness.

16. The Board should not feel itself obliged to tape record its proceedings but should permit a party to record proceedings as long as the manner of so doing is satisfactory to the Board.

17. The Board should adopt the practice, when it is able to reach a decision without reserving past the day of the hearing, of communicating that decision to the parties and preparing formal reasons, if necessary, at a later date.

18. The processing of applications up to and including finalizing of officer's reports should be done in the region where the application arises. One Registry in Ottawa would continue to be the repository of

the master file so that the Board members could readily determine the present status of a matter and so that hearings and *in camera* meetings could be scheduled from Ottawa.

19. Because of the special status of the Board regarding judicial review, the *Code* should be amended to provide that the Board is a party to and may participate in any proceeding in respect of the Board under section 28 of the *Federal Court Act*.

20. Where the complaint of an individual, unrepresented by counsel, is the subject of a hearing, it is recommended that Board Counsel take an active part at the hearing. His role would include the adducing of evidence relevant to the complaint and the presentation of relevant legal materials.

21. The Board should prepare an up-to-date publication advising individuals of their rights under the *Code* and that efforts be made to put such a publication in the hands of employees in the federal sector.

22. The Board should be given the power to make prospective rules and be required to seek public input into such rule making.

Endnotes

1. R.S.C. 1970, c. L-1, amended by 1972, c. 18, 1977-78, c. 27 (hereinafter referred to as the "*Code*").
2. H. D. Woods, *Labour Policy in Canada* at 100-01.
3. *Code*, s. 111. – Note that the Board has acquired jurisdiction with respect to certain matters in Part IV. See *infra*, *Safety Regulations*.
4. The predecessor of the present Board was the Wartime Labour Relations Board created by P.C. 1003, Feb. 17, 1944.
5. See A. W. R. Carrothers, *Collective Bargaining Law in Canada*, at 105-06.
6. Woods, *supra*, note 2, Chapter III, *The Development of Policy from 1900*. Also, *Canadian Labour Law Reporter* at para. 2201-04.
7. The Board is now empowered to issue cease and desist orders, *Code*, ss. 182, 183, and make orders with respect to unfair labour practices, s. 189. Note that prior to March 1, 1973, when Part V was proclaimed, the jurisdiction of the Board was almost entirely restricted to certification and the revocation of certification.
8. Woods, *supra*, note 2 at 49.
9. *Code*, ss. 164, 173. Amendments to the Labour Code in 1978 however had the effect of transferring, in one situation, jurisdiction in the bargaining process to the Board. See *Code*, s. 171.1.
10. *Code*, ss. 2, 108.
11. See generally, Mallory in Crepeau and McPherson, *The Future of Canadian Federalism* (1965).
12. R.S.C. 1907, 6-7 Edward VII, c. 20.
13. *British North America Act*, 1867, 30 and 31 Victoria, c. 3, s. 91.
14. [1881] 7 A.C. 96 (P.C.).
15. F. R. Scott, *Federal Jurisdiction over Labour Relations – A New Look* (1960) 6 McGill L.Rev. 153, at 155.
16. [1925] A.C. 396 (P.C.)
17. *Supra*, note 13.
18. *Id.*

19. For example, Order-in-Council P.C. 1003 proclaimed under the *War Measures Act* which set up the Wartime Labour Relations Board. See also the *Anti-Inflation Reference* [1976] 2 S.C.R. 373 which had significant impact on labour relations in both provincial and federal sectors.

20. *Supra*, note 12.

21. *An Act to Amend the Industrial Disputes Investigation Act, 1907*, S.C. 1925, 15-16 George V, c. 14.

22. During World War II, Order-in-Council P.C. 1003, Feb. 7, 1944, as amended, s. 3(1)(c) extended federal jurisdiction to employees normally under provincial competence if the province wished to apply the federal provisions. Subsequent Acts returned to the 1925 formula. See the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, s. 23; the *Canada Labour Code* S.C. 1966-67, c. 62, ss. 2 and 108(1).

23. For a discussion of the relative merits of federal and provincial jurisdiction, see Scott, *supra*, note 3. For a contrary point of view, see Paul C. Weiler, *The Virtues of Federalism in Canada Labour Law*, at 58 in Industrial Relations Centre, Twenty-Fifth Annual Conference, March 30 and 31, 1977 McGill University.

24. [1925] S.C.R. 505.

25. *Supra*, note 16.

26. Laskin, *Canadian Constitutional Law* (4th ed., 1973) at 363.

27. [1955] S.C.R. 529, at 542; (1955) 3 D.L.R. 721, at 736. The authority of this decision has been recently questioned. See *Arrow Transfer*, a decision of the British Columbia Labour Relations Board, [1974] 1 Can. LRBR 29, at 32. The legal test is stated to be that ". . .if the employees work in an undertaking which is of sufficient national importance that its overall supervision has been allocated to the federal government then so also is its labour relations". There appears to be an assumption that "national importance" is an important part of the test, an assumption which has permitted the British Columbia Board to claim jurisdiction where the national importance of the activity was not evident, although a strong claim might be made for federal constitutional competence. See for example *B.C. Ferry*, [1978] 1 Can. LRBR 197, where the Board, in the absence of unambiguous guidance from the *British North America Act* and jurisprudence, considered as important to the question of jurisdiction, ". . .the natural level of governmental authority" to exercise jurisdiction (at 207).

28. *Supra*, note 16.

29. *Commission du Salaire Minimum v. Bell Telephone Company* [1966] S.C.R. 767 at 772. In *Workmen's Compensation Board v. C.P.R.* [1920] A.C. 184, (1919) 48 D.L.R. 218, (1919) 3 W.W.R. 167, the Privy Council allowed the province to create a statutory right to compensation in lieu of a common law right of action: it did not consider this to amount to provincial regulation of a contract of employment in an area which is *prima facie* within federal competence. See also: *Re the Validity of Industrial Relations and Disputes Investigation Act*, *supra*, note 27, [1955] S.C.R. 529, at 591-92.

It has been contended that the principle of the co-extensiveness of federal constitutional jurisdiction and the exercise of federal legislative competence in the regulations of labour relations has been under attack in the Federal Court of Appeal: see Robert W. Kerr, *Comment, The Basic Jurisdiction of the Canada Labour Relations Board — Is it Concurrent with Federal Legislative Power?* in (1977) 55 C.B.R. 556. He analyses the decisions in *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* [1976] 1 F.C. 174, (1976) 60 D.L.R. (3d) 473, 11 N.R. 606 (C.A.) and *Canada Labour Relations Board, Public Service Alliance of Canada v. City of Yellowknife* [1977] 2 S.C.R. 729. Whatever construction is to be placed upon the decision of the Federal Court of Appeal in *Cannet*, it is clear from the reversal of its decision in the *Yellowknife* case by the Supreme Court of Canada that the scope of federal legislation and federal jurisdiction are co-extensive. In the *Cannet* case the jurisdiction of the Canada Labour Relations Board to certify the union for the employees of Cannet Freight Ltd. was denied by the Federal Court of Appeal. Cannet Freight Ltd. rented cars from the C.N.R. to transport its customers' goods, and employees in question loaded the freight in the Toronto area. The court held that Cannet Freight Ltd.'s business was purely local and not integrated into the federal undertaking of the C.N.R. In reaching this conclusion the court apparently considered the nature of the contractual relations between Cannet Freight Ltd. and the C.N.R., as well as the question of the integration of the freight forwarding with the federal undertaking. The decision appears to indicate a departure from previous jurisprudence on both these issues. In *Canadian Pacific Railway v. Attorney-General for British Columbia* [1950] A.C. 122, (1950) 1 D.L.R. 721, (1950) 1 W.W.R. 220 (P.C.), it was held that corporate arrangements were immaterial to the resolution of constitutional jurisdiction and the power to regulate labour relations. At 558, Kerr suggests that a company may place itself beyond the scope of the legislation by its contractual arrangements. See, however, Colin H. McNairn, *Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction* (1969) 47 C.B.R. 355 at 375 for a discussion of the relevance of corporate organization. In the *Stevedoring Reference*, *supra*, note 27, the loading of cargo in connection with interprovincial shipping was held to be an activity integrally connected with a federal undertaking. Heald, J. in distinguishing the similar operation of loading railway cars in *Cannet*, confined the holding in the *Stevedoring Reference* to the special relationship between a shipper and a ship owner, where loading is ". . .the joint act of both. . ." (at 477).

30. See Hogg, *Constitutional Law of Canada* (1977), at p.308: "Stripping the issue of its constitutional jargon, is there any reason why residents of Quebec should be denied the protection of a minimum wage law because they happen to be employed in a federally regulated industry? Is there any reason why that industry should not pay wages regulated by provincial law, just as it pays for its accommodation, equipment and supplies under provincial law? Remembering that the law in question was perfectly general in its application, not singling out federal industries for special treatment, the answer to these questions is surely no. The province has a legitimate interest in the employment standards

enjoyed by its residents. The Dominion also has a legitimate interest in the costs incurred, and standards maintained, by industries under its jurisdiction. But this interest is not impaired by the existence of concurrent provincial jurisdiction, because the federal parliament can always enact its own law for an industry and the paramountcy doctrine will render inoperative any inconsistent provincial law."

31. In practice, the Canada Labour Relations Board exercises jurisdiction over longshoring, shipping, railways, communications, road transport, pipelines, ferries, tunnels, bridges, air transport, broadcasting, banks, grain elevators, flour and feed mills, seed cleaning mills, uranium mining and processing, crown corporations, primary fishing, Indian band councils, schools and community colleges and undertakings in the Yukon and Northwest Territories. See *Annual Report of the C.L.R.B. 1973-75*: Appendix I. For a discussion of jurisdiction over a broad range of activities in non-provincial areas of Canada, see *Canada Labour Relations Board, Public Service Alliance of Canada v. City of Yellowknife* [1977] 2 S.C.R. 729.

32. *Supra*, note 13.

33. In virtue of s. 91(9) Beacons, Buoys, Lighthouses and Sable Island; 91(10) Navigation and Shipping; 91(12) Sea Coast and Inland Fisheries; 91(13) Ferries between a Province and any Country or between Two Provinces. *Montreal v. Montreal Harbour Commissioners* [1926] A.C. 299, (1926) 1 D.L.R. 840, (1926) 1 W.W.R. 398 (P.C.).

34. By virtue of ss. 91(29), 92(10)(*a*) and (*c*). See, the *Stevedoring Reference*, *supra*, note 22; *Agence Maritime Inc. v. Canada Labour Relations Board* [1969] S.C.R. 851; *Canadian Brotherhood of Railway, Transport and General Workers and Finlay Navigation Ltd.* 25di 411, [1978] 1 Can LRBR 516, 78 CLLC 16, 143; and *Toronto Transit Commission v. Aqua Taxi Ltd.* (1957) 6 D.L.R. (2d) 721 (Ont. S.C.).

35. For a discussion of this area see Colin H. McNairn, *supra*, note 29.

36. "Neither the degree nor the nature of the integration required is, however, entirely clear". *Id.*, at 374. See also, for example, *Re Pacific Produce Delivery and Warehouse Ltd.* (1974) 44 D.L.R.(3d) 130 (B.C.C.A.).

37. *Attorney-General for Ontario v. Winner* [1954] A.C. 541, (1954) 4 D.L.R. 657, at 680, 13 W.W.R. (N.S.) 657 (P.C.).

38. *Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.* [1965] 1 O.R. 84, 46 D.L.R.(2d) 700 (Ont. H.C.). In *Re Tank Truck Transport Ltd.* [1960] O.R. 497, (1961) 25 D.L.R.(2d) 161 (Ont. H.C.) it was held that the activity must be continuous and regular, though the provisions of a regular schedule were immaterial. On similar facts, in *Regina v. Manitoba Labour Board, Ex parte Invictus Ltd.* (1968) 65 D.L.R.(2d) 517 (Man. Q.B.), the court found that the undertaking was "essentially and basically" (at 529) intra-provincial. This case was not followed by the Ontario Labour Relations Board: see, *Ontario Public Service Employees Union and Charterways Transportation Ltd.* [1977] 1 Can LRBR 237.

39. The federal government has regulated these in *The National Energy Board Act* R.S.C. 1970, c. N-6, as amended. This federal regulatory power was upheld in *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Transmountain Pipeline Co.*, [1954] S.C.R. 207, (1954) 3 D.L.R. 481. See also, *International Brotherhood of Electrical Workers and Westcoast Transmission Company Ltd.* [1974] 1 Can LRBR 110 (B.C.L.R.B.) and *Westcoast Transmission Company Ltd. and The International Union of Operating Engineers, Local No. 882* [1977] 2 Can LRBR 39, and [1978] 1 Can LRBR 9 (B.C.L.R.B.). For a discussion of the division of jurisdiction, see John B. Ballem, *Constitutional Validity of Provincial Oil and Gas Legislation* (1963) 41 C.B.R. 199.

40. *The King v. Eastern Terminal Elevator Co.* [1925] S.C.R. 434 at 448, (1925) 3 D.L.R. 1.

41. The *Canada Grain Act* S.C. 1970-71-72, c. 7, as amended, s. 43. *Jorgenson v. Attorney-General for Canada* [1971] S.C.R. 725; *Melograin Milling Co. Ltd.* [1974] 1 Can LRBR 222 (B.C.L.R.B.).

42. The *Canadian Wheat Board Act* R.S.C. 1970 c. C-12 as amended, s. 45; *The Queen v. Thumlert* (1960) 20 D.L.R.(2d) 335 (Alta. S.C. App. Div.); *Chamney v. The Queen* [1975] 2 S.C.R. 151.

43. The *Railway Act* R.S.C. 1970, c. R-2, as amended, ss. 6(2), 7; *Montreal v. Montreal Street Railway* [1911] A.C. 333, 1 D.L.R. 681 (P.C.); *Luscar Collieries Ltd. v. MacDonald* [1927] A.C. 925, [1921] 3 W.W.R. 454, (1927) 4 D.L.R. 85 (P.C.). See, Phineas Schwartz, *Fiat by Declaration – s. 92(10)(c) of the British North America Act* (1960) 2 Osgoode Hall L.J. 1; Kenneth Hanssen, *The Federal Declaratory Power under the British North America Act* (1968) 3 Man. L.J. 87.

44. *Re Regulation and Control of Radio Communication* [1932] A.C. 304, (1932) 2 D.L.R. 81, 1 W.W.R. 563 (P.C.); *Re C.F.R.B. and Attorney-General for Canada* [1973] 3 O.R. 819, (1974) 38 D.L.R.(3d) 335 (Ont. C.A.); *Re Public Utilities Commission and Victoria Cable Vision* (1965) 51 D.L.R.(2d) 716 (B.C.C.A.); *The Bell Telephone* case, *supra*, note 29; *International Brotherhood of Electrical Workers and Westcoast Transmission Co. Ltd.* [1974] 1 Can LRBR 110 (B.C.L.R.B.); *Tasco Telephone Answering Exchange Ltd. and Retail, Wholesale and Department Store Union, Local No. 580* [1977] 1 Can LRBR 273 (B.C.L.R.B.); *Canadian Telephones and Supplies Ltd., and B.C. Telephone Supervisors' Association* [1975] 1 Can LRBR 358 (B.C.L.R.B.); *Canadian Union of Public Employees and Paul L'Anglais Inc.* 28 di 934; [1979] Can LRBR 332.

45. *The Aeronautics Act* R.S.C. 1970, c. A-3; *Re Regulation and Control of Aeronautics* [1932] A.C. 54 (P.C.); *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292; *Canadian Air Line Employees Association v. Wardair Canada (1975) Ltd.* (C.A.) [1979] 2 F.C. 91. It appears that purely intra-provincial aeronautics also fall within federal jurisdiction: *Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers* [1975] F.C. 590, at 593 (C.A.). For reference, see also Colin H. McNairn, *Aeronautics and the Constitution* (1971) 49 C.B.R. 411.

46. *The Atomic Energy Control Act* R.S.C. 1970, c. A-19 as amended. *Pronto Uranium Mines Ltd. and Algom Uranium Mines Ltd. v. Ontario Labour Relations Board* [1956] O.R. 862, (1956) 5 D.L.R.(2d) 342 (Ont. H.C.); *Bachmeier Diamond v. Beaverlodge* (1962) 35 D.L.R.(2d) 241 (Sask. C.A.). See also Laskin, *Comment — Labour Relations in Uranium Mines — Functional Considerations Determining Limits of Legislative Power* (1957) 35 C. B.R. 101.

47. *Supra*, note 27 at 542.

48. *Supra*, note 27.

49. *Id.*, at 535 *per* Kerwin C.J.C.

50. *Id.*, at 568 *per* Estey J.

51. *Viz*: ". . .it is the appropriateness, on a balance of interests and convenience, to the main subject matter of the legislation". *Id.*, at 548-49.

52. There has however been a revival of interest in Rand J.'s formulation. It was one of the grounds for the holding in *Re Colonial Coach Lines and Ontario Highway Transport Board* [1967] 2 O.R. 25, at 33; 62 D.L.R. (2d) 270, at 278 (Ont. H.C.), and permitted the British Columbia Labour Relations Board to find provincial jurisdiction over a ferry service that regularly travelled out of provincial waters. *B.C. Ferry Corporation and British Columbia Ferry and Marine Workers* [1978] 1 Can LRBR 197.

53. *Supra*, note 27. See also *Centeast Auto Terminals Ltd.* [1974] O.L.R.B. Rep., Feb. 67.

54. *Supra*, note 27, Kerwin C.J.C. stated that legislation ". . .should not be construed to apply to employees who are employed at remove stages but only to those whose work is intimately connected with the work, undertaking or business" (at 535).

55. *C.P.R. v. Attorney-General for British Columbia* [1950] A.C. 122, (1950) 1 D.L.R. 721, (1950) 1 W.W.R. 220 (P.C.); *Bachmeier Diamond v. Beaverlodge*, *supra*, note 46; *Underwater Gas Developers Ltd. v. O.L.R.B.* [1960] O.R. 416, (1960) 24 D.L.R. (2d) 673 (Ont. C.A.); *Murray Hill Limousine Service Ltd. v. Sinclair Batson Co.* [1965] B.R. 778, 66 C.L.L.C. 14,143 (Que. Q.B.); *Teamsters International Union Local 990 and North Shore Supply* [1975] 1 Can LRBR 25 (O.L.R.B.); *Cargil Grain Company*, unreported, B.C.L.R.B. Decision No. 36/78; *General Enterprises Limited and Teamsters Local Union No. 213* (1979) 27 di 790; *Construction Montcalm Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754; 79 CLLC 14,190.

56. No such primary federal undertaking was found in *Underwater Gas Developers*, *supra*, note 55. The key activity was held to be the establishment and servicing of gas well sites and not navigation and shipping. This absence of a key federal undertaking would appear also to be the basis for the decisions in freight forwarding cases. See, for example, the *Cannet* case, *supra*, note 29.

57. The idea that the ". . .functional interrelation of any group of operations must be such as to make all of them reasonably susceptible to uniform

treatment in terms of applicable legislative power. . ." also finds support in United States constitutional law. See Laskin, *supra*, note 46 at 103. Provincial labour relations boards have also used a functional test. See, for example, *Yellow Jacket Welding Company* [1974] O.L.R.B. Rep. Oct. 709 at 713; *Canadian Telephones and Supplies Ltd.* (1975) 1 Can LRBR 358 (B.C.L.R.B.).

58. *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and Canadian Pacific Ltd. and Marathon Realty Company Ltd.* 25 di 387, [1978] 1 Can LRBR 493, 78 CLLC 16,138. A distinction is made in this case between the question of whether there is integration into a federal activity and the question of whether the employees can then be said to be employed on that activity.

59. It has been suggested that the degree of integration is not the criterion relied upon but that, "the test derives its substantive character and strictness from the court's understanding of the nature of the federal head of power under consideration". For a discussion of this suggestion see S. Wynton Semple, *Parliament's Jurisdiction over Labour Relations* (1977) 11 U.B.C. L. R. 232, at 234-35.

60. *Midvalley Construction Ltd. v. Board of Industrial Relations of Alberta* [1974] 6 W.W.R. 575, at 576. (Alta. S.C.). *Construction Montcalm Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754, 79 CLLC 14,190.

61. *Re City of Kelowna and Canadian Union of Public Employees Local No. 338* (1974) 42 D.L.R.(3d) 754 (B.C.S.C.).

62. See A. W. R. Carrothers, *Collective Bargaining Law in Canada* (1965) at 75-83. For example, contrast the holdings in the *Pronto Uranium Mines* and *Bachmeier Diamond* cases, *supra*, note 46; or those in *Regina v. Ontario Labour Relations Board, Ex parte Dunn* [1963] 2 O.R. 301, 39 D.L.R. (2d) 346 (Ont. H.C.); and those in the *Invictus* and *Tank Truck* cases, *supra*, note 38. Note also the rejection in the *Charterways Transportation* case, *supra*, note 38, of the test used in *Invictus*. See also, the discussion in *Cannet*, *supra*, note 29. The criteria for determining that activities are functionally integrated have been unevenly applied. For example, while contractual or corporate arrangements were rejected as irrelevant to integration in the *Stevedoring Reference*, *supra*, note 27, in the *C.P.R.* case, *supra*, note 55, in the *Ex parte Dunn* and in *North Shore Supply*, *supra*, note 55, where the allegedly federal operations were almost wholly-owned subsidiaries of a related federal undertaking, a consideration of these factors would appear to be critical to the line of holdings in the freight forwarding cases. In the *Centeast* case, *supra*, note 53, the Board characterized the loading and unloading of automobiles from C.N.R. trains as an integral part of a federal activity. This would appear to be a correct result of an application of the test of functional integration. However, where the Board has focussed on the contractual or organizational feature of freight forwarding, it has permitted them to find that the shipping of goods by rail is the local operation of a company falling under provincial jurisdiction. See, for example, *David Beaton and General Truck Drivers' Union, Local 938*

and Consolidated Fastfrate Ltd. [1974] 1 Can LRBR 296 (O.L.R.B.). This is the approach taken by the Federal Court of Appeal in *Cannet*. In *Ex parte Dunn* the Court addressed itself to the question of whether the related activity could be performed by another company. As McNairn comments, *supra*, note 29 at 378, the federal power would be severely limited if this were a criterion. This test has little currency but is indicative of a confusing judicial tendency toward improvisation.

63. Compare the decisions of the British Columbia and Canada Boards in *E. Lobe Contracting Ltd.* (unreported, British Columbia Labour Relations Board #15/76) and *General Enterprises Ltd.* 23 d.i. 26, [1977] 1 Can LRBR 432, 77 CLLC 16, 09.

64. As an example, the British Columbia Labour Relations Board has expressed its policy to minimize the seriousness of the consequences by giving the parties an early indication of the existence of a constitutional problem and indicating a willingness to forward the whole file to the federal board. See *Arrow Transfer*, *supra*, note 27, and *Melograin Milling*, *supra*, note 41. Several provincial boards have followed suit. The Canada Labour Relations Board fully cooperates in such efforts. However, the matter must be resolved a second time upon rejection of jurisdiction by the board first seized.

65. For a discussion of the courts' approach to delegation, see G. V. La Forest, *Delegation of Legislative Power in Canada* (1975) 21 McGill L.J. 133.

66. *Code*, s. 114.

67. *Id.*, ss. 117, 118. Note however that review of a decision of the Board is available if the rules of natural justice are not observed. *Id.*, s. 112; *Federal Court Act*, s. 28(1)(a).

68. Compare *The Labour Relations Act* R.S.O. 1970, c. 232, s. 91(12) and *Code du Travail* S.R. Q. 1964, c. 141 et modifications, ss. 24e, 32 with *Canada Labour Relations Board Regulations* 1978, SOR/78-499, 2 June, 1978 s. 19(2).

69. *Code*, s. 118.

70. *Id.*, s. 118(i) and 127.

71. *Id.*, s. 118(m). See *Upper Lakes Shipping Ltd. v. Sheehan et al.*, [1979] 1 S.C.R. 902.

72. *Id.*, s. 118(p).

73. *Id.*, s. 118.1. This recent enactment is subsequent to and reverses the decision of the Federal Court of Appeal in *CKOY Limited v. Ottawa Newspaper Guild* [1977] 2 F.C. 412.

74. *Id.*, s. 120.1.

75. *Id.*, s. 122.

76. *Id.* The privative clause in s. 122 was modified by 1977-78, c. 27, s. 43 to exclude review on the grounds that the Board "erred in law in making its decision or order, whether or not the error appears on the face of

the record. . .or based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." *Federal Court Act*, s. 28(1)(*b*) and (*c*). See *infra*, Chapter Four.

77. *Code*, s. 119.

78. *Id.*, s. 123.

79. The sections conferring jurisdiction on the Board over safety standards are proclaimed effective as of September 1, 1978. See *infra*.

80. Woods, *supra*, note 2, at 115-16. Note that the *Canada Labour Code* allows application for an order that a non-certified bargaining agent is not entitled to represent the employees of a unit during certain prescribed times: *Code*, s. 137(3).

81. *Code*, s. 126.

82. *Industrial Relations and Disputes Investigation Act*, 1948, c. 54, s. 1, s. 7(1), re-enacted in the *Canada Labour Code*, 1966-67, c. 62, s. 30, s. 113(1). This is consistent with the recommendations for change in the *Report of the Task Force on Labour Relations* (1968) at 143.

83. The representation vote is valid if 35% of the employees eligible to vote participate: *Code*, s. 129(2). The vote is mandatory where the union has as members between 35% and 50% of the employees or where no other trade union exists as bargaining agent for the unit: *Code*, s. 127(2).

84. *Id.*, s. 127(2).

85. *Id.*, s. 127(3), which supersedes the decision in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796* 70 C.L.L.C. para.14,008 (S.C.C.). This provision may be *ex abundanti cautela* in light of the fact that the *Code* only requires majority support, not membership. *Toronto Dominion Bank v. Canada Labour Relations Board* [1979] 1 F.C. 386 (F.C.A.).

86. *Id.*, s. 125.

87. Certain provisions are made for professional employees, supervisors and private constables, *Id.*, s.125(3), (4), and (5). As to the Board's power to determine appropriateness, see *infra*, Chapter 6.

88. *Id.*, s. 132.

89. *Id.*, s. 124. The statute prohibits applications save with the Board's consent during the first six months of a strike or lockout. The Board cannot abridge or enlarge statutory time limits: *Upper Lakes Shipping Ltd.*, *supra*, note 71.

90. *Id.*, s. 134(1).

91. *Id.*, s. 134(2).

92. *Id.*, s. 146.

93. *Id.*, s. 136.

94. *Id.*, ss. 137, 138.

95. *Id.*, s. 142(*a*).

96. *Canada Labour Relations Board Annual Report* 1976-77, at 17.

97. Carrothers, *supra*, note 5 at 111: "A complaint of an unfair labour practice is a charge that an employer, a union, or a person acting on behalf of an employer or union, has done something that is prohibited or failed to do something that is required by the *Canada Labour Code*". See *ULP How to file a complaint of unfair labour practice*, a booklet published by the Canada Labour Relations Board, at 7.

98. *Code*, s. 110. See ss. 124(4), 136.1, 148, 161.1, 184, 185, and 186.

99. Note that s. 124(4) prohibits the employer from altering working conditions where an application for certification has been made. This serves to protect the union in its attempts to maintain membership support should a representation vote be held.

100. *Id.*, s. 184(2).

101. *Id.*, s. 184(3)(*g*).

102. *Id.*, s. 184(3).

103. *Id.*

104. *Id.*, s. 185(*a*), (*b*).

105. *Id.*, s. 185(*c*).

106. *Id.*, s. 185(*e*).

107. *Id.*, s. 185(*f*), (*g*), (*h*).

108. *Id.*, s. 185(*i*).

109. *Id.*, s. 186.

110. Prior to the 1972 amendments to the *Canada Labour Code* 1966-67, c. 62, s. 30 by 1972, c. 18, the courts were empowered to deal with complaints of unfair practices. Prosecution required the consent of the Minister, *id.*, s. 152(1); the courts could impose fines and make orders for reinstatement and compensation, s. 146. Unfair labour practices are no longer offences which may be prosecuted, *Code*, s. 191.

111. *Code*, s. 187(2). The Board has recently held that this time limit does not apply in the absence of a grievance or appeal procedure where section 187(4) is applied. *Cassista et al. and International Longshoremen's Association* 28 di 955, [1979] 2 Can LRBR 149.

112. *Id.*, s. 187(3).

113. *Id.*, s. 187(4).

114. *Id.*, s. 184(3)(*g*), 185(*a*) and (*b*).

115. *Id.*, s. 187(5).

116. *Id.*, s. 189(b). This is limited to contraventions of s. 184(3)(*a*), (*c*), (*e*) and (*f*).

117. *Id.*, s. 189(*d*) and (*e*).

118. *Id.*, s. 189.

119. *Supra*, note 96, at 17.

120. Inclusion of the provisions of successor rights and obligations followed the recommendations of *The Report of the Task Force*, *supra*, note 82 at 144-45.

121. *Code*, s. 143.

122. Sale is defined to include "lease, transfer and other disposition", *id.*, s. 144(1).

123. *Id.*, s. 144(2).

124. *Id.*, s. 144(3).

125. *Id.*, s. 144(5). See Carrothers, *supra*, note 5 at 262-71, for an account of early provincial legislation in this area.

126. *Supra*, note 96, at 17.

127. These provisions follow the recommendations of the *Task Force*, *supra*, note 82, at 193-96.

128. *Code*, s. 149.

129. *Id.*, ss. 150, 152, 153.

130. *Id.*, s. 150.

131. *Id.*, s. 152.

132. *Id.*, s. 151.

133. *Id.*, s. 152.

134. *Id.*, s. 153.

135. See the *Statistics* compiled by the C.L.R.B. as of April 30, 1978.

136. *Wartime Labour Relations Regulation*, Order-in-Council P.C. 1003, Feb. 17, 1944, s. 21; *The Industrial Relations Dispute Investigation Act* 1948, c. 54, s. 1, ss. 21-24, the *Canada Labour Code* 1966-67, c. 62, s. 30, ss. 172-130 continued the provisions of the earlier legislation as recommended by the *Task Force Report*, *supra*, note 82 at 175-76.

137. S. C. 1977-78, c. 27, s. 64.

138. *Code*, s. 180(1).

139. *Id.*, s. 180(2).

140. *Canada Labour Code* S.C. 1966-67, c. 62, s. 30, ss. 147-148, 152.

141. The Board is authorized to make declarations of an illegal strike or lockout by ss. 182 and 183 of the *Code*.

142. *Code*, ss. 182, 183.

143. The constitutionality of similar provisions in Nova Scotia legislation was confirmed in *Tomko v. Labour Relations Board (Nova Scotia)* [1977] 1 S.C.R. 112.

144. *Code*, s. 183.1.

145. *Id.*, s. 190.

146. *Id.*, s. 194, enacted by 1977-78, c. 27, s. 69.

147. *Supra*, note 96, at 17.

148. *Code*, s. 171.1. This section was proclaimed on June 1, 1978. The parties are free to amend these terms by written agreement.

149. *Id.*, s. 171.1 (3)(*a*), (*c*).

150. *Id.*, s. 171.1(3)(*b*). See Woods, *supra*, note 2 at 158-59. This has also been seen as a remedial role, a sanction of employer failure to bargain in good faith, and not essentially a norm-creating function.

151. Woods, *supra*, note 2 at 158-59. Minimum standards are however fixed by Part III of the *Canada Labour Code*. Pursuant to s. 171.1 the Minister of Labour by letter dated June 13, 1978 has referred to the Board's consideration of the settlement of first collective agreements between the appropriate locals of the C.S.N. and C.J.M.S. Montreal Limitee, C.J.T.R. Radio Trois-Rivières Limitee, C.J.R.S. Radio Sherbrooke Limitee, and Radiodiffusion Mutuelle Limitee, Montreal.

152. *Code*, s. 136.1, enacted by 1977-78, c. 27, s. 49. See *The Task Force Report*, *supra*, note 82 at 104, 152, which recommended the imposition of this obligation. An offence under s. 136.1 is included in the term "unfair labour practice", regulation 35(1), *supra*, note 68.

153. Some jurisdiction over internal affairs existed already by virtue of s. 185.

154. *Code*, s. 189(*a*).

155. *Id.*, s. 194.

156. This applies *mutatis mutandis* to an employer's organization: *id.*, s. 199.1.

157. *Id.*

158. *Id.*, s. 161.1 enacted by 1977-78, c. 27, s. 58.

159. *Id.*, ss. 188(1), 187.

160. *Id.*, s. 199.

161. *Supra*, note 96, at 17.

162. *Id.*, ss. 148. This offence is included in the term "unfair labour practice", regulation 35(1), *supra*, note 68.

163. *Id.*, s. 148(*b*). A similar prohibition exists upon the making of an application for certification, *id.*, s. 124(4).

164. *Id.*, ss. 187-189. Prosecution for an alleged breach of s. 148 is not available.

165. *Id.*, s. 189(*a*)(1).

166. The sections on safety standards which provide for the referral of complaints to the Board were proclaimed effective September 1, 1978. The relevant sections are 82.1(8), (9), (10), (11); 94(2); 95(1), (2); 96.1(1), (2), (3), (4); 96.2(1), (2); 96.3, 96.4, 97(1)(*d*).

167. *Id.*, s. 82.1(8).

168. *Id.*, s. 82.1(9), (10), (11).

169. *Id.*, ss. 94, 95.

170. *Id.*, ss. 96.1, 96.2.

171. *Code*, s. 111(2).

172. *Id.*, s. 111(3).

173. *Id.*, s. 111(5).

174. At 207-08.

175. Paul C. Weiler, *The Administrative Tribunal: A view from the Inside*, (1976) 26 U.T.L.J. 193.

176. *Ibid.*

177. Interview with the writer, September 19, 1978.

178. *Code*, s. 111(5)(*b*).

179. *Id.*, s. 115(1).

180. S. C. 1977-78, c. 27, s. 43. For a discussion of section 119 and of the restricted access to judicial review see Chapter 4, *infra*.

181. As recommended in Chapter 3.

182. Chapter 2, *supra*.

183. James E. Dorsey "*The Other Labour Relations Board*" unpublished paper presented to the Labour Law Section of the British Columbia Branch of the Canadian Bar Association, December 13, 1978.

184. S.B.C. 1973 (2nd Sess.) c. 125; 1974, ch. 87; 1975, c. 33; 1976, c. 26; 1976, c. 32; 1977, c. 72.

185. Paul C. Weiler "*The Administrative Tribunal: A View from the Inside*", (1976) 26 U.T.L.J. 193 at 202.

186. R.S.C. 1970, 2nd Supp, c. 10; see *Magnasonic Canada Ltd. v. Anti-Dumping Tribunal* [1972] F.C. 1239 (C.A.).

187. *Supra*, note 184.

188. Interviews by the writer of Donald R. Munroe, Chairman, British Columbia Labour Relations Board.

189. For example the Ontario Labour Relations Board's offices conduct inquiries as to the employee status of disputed positions. The findings of the officer are communicated to the parties who have the opportunity to file submissions rebutting the officer's conclusions.

190. *Code*, s. 107.

191. *Code*, ss. 118 (*p*), (*v*).

192. 13 di 13 at 27; [1976] 1 Can LRBR 361 at 365; 76 CLLC 16,018 at 491.

193. If the effect of the addition is that the union's support is less than 35%.

194. Although that may be seen as taking care of the problem it could, unnecessarily in my view, expose the trade union to a later complaint of failure to represent in good faith: *Code*, s. 136.1.

195. *Code*, s. 119.

196. See text at p. 29.

197. S. 171.1(3) provides that "the Board shall give the parties an opportunity to present evidence and make representations. . ..".

198. *Canada Labour Relations Board Regulations*, 1978, SOR/78 499, June 2, 1978, s. 19.

199. *Id.*, s. 20.

200. *Id.*, s. 21.

201. *Id.*, s. 22.

202. *Id.*, s. 23.

203. *Code*, s. 118(*c*).

204. *Supra*, note 192, at 24, 363 and 489.

205. This was seen by the Supreme Court of Canada as a notable distinction between a court and a labour relations board in *Tomko v. Labour Relations Board (Nova Scotia)*, [1977] 1 S.C.R. 112, where the court rejected the argument that section 96 of the *British North America Act* prevented a provincial legislature from conferring on a board the power to issue cease and desist orders in respect of unlawful strike action.

206. *Code*, s. 192.

207. *Id.*, s. 194. Until the 1978 amendments, it was the Minister of Labour whose consent was required.

208. Until the 1978 amendments, any party affected by the order could file it in the court. This power now rests with the Board, which must comply with a request by an affected party to file it if there is an indication of a failure to comply with the order, unless there is ". . .good reason why the filing of the order or decision in the Federal Court would serve no useful purpose." *Code*, s. 123.

209. *Id.*, s. 123(2).

210. *Code*. s. 119.

211. See, for example, *The Labour Relations Act* 1977, S.N. 1977, c. 64, s. 18(2); *Trade Union Act*, S.N.S. 1972, c. 19, s. 18(1).

212. *Labour Relations Board of British Columbia v. Oliver Co-operative Growers Exchange* [1963] S.C.R. 7, 62 C.L.L.C. 15,428, at 541.

213. See *Pringle et al v. Fraser* [1972] S.C.R. 821, 26 D.L.R.(3d) 28; *British Columbia Securities Commission and Attorney General of British Columbia v. Robertson* (1974) 2 W.W.R. 165 (B.C.C.A.).

214. 9 di 20; [1975] 1 Can LRBR 327; 75 CLLC 16,158.

215. *Id.*, at 26-27, 336, and 1185.

216. *Id.*, at 25-26, 334-35.

217. *Whitehorse Hotels Ltd.*, 2 di 410; [1977] 1 Can LRBR 477; 77 CLLC 16,080.

218. *British Columbia Telephone Company* 22 di 504; [1977] 2 Can LRBR 404; 77 CLLC 16,608.

219. *Northern Construction Ltd.* (1977) 19 di 128. *Northwest Community Video Ltd.* (1976) 14 di 132.

220. See, for example, *Gretzky v. Ontario Minor Hockey Association* [1976] 10 O.R. (2d) 759, (1975) 64 D.L.R.(3d) 467 (Ont. High Ct.).

221. *Tippett v. International Typographical Union* (1975) 63 D.L.R.(3d) 522 (B.C.S.C.).

222. See, for example, *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s.23.

223. See, for example, *National Transportation Act*, R.S.C. 1970, c. N-17.

224. Leadbeater, *Appeals from Federal Administrative Authorities to the Federal Court of Canada* (1978) (an unpublished paper prepared for the Law Reform Commission of Canada), at 2-3.

225. *Canada Labour Code*, R.S.C. 1970, c. L-1, 1972, c. 18, s. 122.

226. See, Lyon, "*Comment: The Role of Canadian Courts in Supervising the Exercise of Power Delegated by Provincial Legislatures to Labour Relations Boards and Similar Tribunals*" (1971) 49 C.B.R. 365; Weiler, "*The Slippery Slope of Judicial Intervention*" (1971) 9 Osgoode Hall L.J. 1; Laskin, *Comment* (1963) 44 C.B.R. 446; Laskin, "*Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*" (1952) 30 C.B.R. 986.

227. The most notable examples of which are: *Barbara Jarvis v. Associated Medical Services and Ontario Labour Relations Board* [1964] S.C.R. 497 and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers* [1970] S.C.R. 425.

228. See Weiler, "*The Administrative Tribunal: A View from the Inside*" (1976) 26 U.T.L.J. 193.

229. See Mullan, "*The Federal Court Act: A Misguided Attempt at Administrative Law Reform*" (1973), 23 U.T.L.J. 14. Provincial superior courts

acceded to this loss of jurisdiction in a very begrudging manner (see *Bedard v. Issac* [1972] 2 O.R. 391 (H.C.)). However, since the Supreme Court of Canada decision in *Commonwealth of Puerto Rico v. Hernandez* [1975] 1 S.C.R. 228, there is no doubt that this transfer of jurisdiction is complete.

230. *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10, s. 27.

231. *Id.*, s. 31(2).

232. *Id.*, s. 31(3).

233. Jackett, "The Federal Court of Appeal" [1973] O.H. L.J. 253; Chalmers "The Federal Court as an Attempt to Solve Some Problems of Administrative Law in the Federal Area" (1974) 18 McGill L.J. 206; Fera, "Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered" (1976) 22 McGill L.J. 234. The Law Reform Commission of Canada has recently published a Working Paper on the subject: *Federal Court, Judicial Review*, Law Reform Commission of Canada, Working Paper 18.

234. *Thomas v. Attorney General for Canada* [1972] F.C. 208 at 222 (C.A.).

235. *Rohm and Haas Canada Limited v. Anti-Dumping Tribunal* (1978) 22 N.R. 175 (F.C.A.).

236. See for example the judgment of Freedman, J.A. in *Parkhill Bedding and Furniture Ltd. v. International Molders and Foundry Workers' Union et al* (1961) 26 D.L.R.(2d) 589 (Man.C.A.).

237. This approach was based upon an interpretation of the words ". . .made by or in the course of proceedings. . ." found in section 28 and based upon section 28(3). See *Grauer Estate v. The Queen* [1973] F.C. 355 (T.D.).

238. David J. Mullan, *The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction* (1978) (a study prepared for the Law Reform Commission of Canada).

239. *British Columbia Packers Ltd. v. Canada Labour Relations Board* [1973] F.C. 1194 (C.A.); *In Re Peltier* [1977] 1 F.C. 118 (T.D.).

240. [1974] 2 F.C. 913 (T.D.).

241. *Id.*, at 921.

242. *Bell Canada Communications Workers of Canada and Canadian Telephone Employees Association* [1976] 1 F.C. 459 (F.C.A.); *Durham Transport Inc. v. International Brotherhood of Teamsters and the Canada Labour Relations Board* (1978) 21 N.R. 20 (F.C.A.); *Sheehan v. Canadian Brotherhood of Railway Transport and General Workers, Canadian Maritime Union, Local 401 and Canada Labour Relations Board* (1978) 19 N.R. 468 (F.C.A.); *Re Greyhound Lines of Canada Ltd. and Office & Professional Employees International Union*, (1978) 24 N.R. 382 (F.C.A.); *C.S.P. Foods Ltd. v. Canada Labour Relations Board and Grain Services Union*, [1979] 2 F.C. 23 (C.A.); *Canadian Arsenals Limited v. Canada Labour Relations Board*, [1979] 2 F.C. 393 (C.A.).

243. *Syndicat des Employés de CJRC (CNTU) v. Canada Labour Relations Board, Syndicat des Employés de CJRC et al* (1978) 78 C.L.L.C. 14,179 (F.C.A.).

244. *Voyageur Inc. v. Syndicat des Chauffeurs de Voyageur Inc. (CNTU) and Union of Transport Drivers, Warehousemen and General Workers, Local 106 and Canada Labour Relations Board and the Attorney General of Canada* [1975] F.C. 533 (C.A.).

245. *Bank of Nova Scotia v. Canada Labour Relations Board* [1978] 2 F.C. 807 (C.A.); *Bank of Montreal v. Canada Labour Relations Board* [1979] 1 F.C. 87 (C.A.); *Empire Stevedoring Company Ltd. v. International Longshoremen Local 514* [1974] 2 F.C. 742 (C.A.).

246. *Canada Labour Relations Board and Canadian Brotherhood of Transport and General Workers v. Canadian National Railway* [1975] 1 S.C.R. 786; *Holmes Transportation v. Transport Drivers, Warehousemen and General Workers, Local 106*, [1978] 2 F.C. 520 (C.A.); *Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers and Canada Labour Relations Board* [1975] F.C. 590 (C.A.).

247. *Paul L'Anglais Inc. and J.P.L. Productions Inc. v. Canada Labour Relations Board* [1979] 2 F.C. 444 (F.C.A.).

248. (S.C.C.) [1977] 2 S.C.R. 112.

249. *Canada Labour Code*, *supra*, note 225.

250. [1977] 2 F.C. 412 (C.A.). See also *Northern Telecom Ltd. v. Communications Workers of Canada, Thompson et al and Canada Labour Relations Board* [1977] 2 F.C. 406 (C.A.).

251. *Canada Labour Code*, *supra*, note 225.

252. *Supra*, note 250 at 425. There was a short lived extension of this logic in the decision in *Victoria Flying Services v. Canadian Brotherhood of Railway, Transport and General Workers* (1978) 78 C.L.L.C. 14,118 where the Federal Court of Appeal interpreted the decision in *CKOY* as standing for the proposition that the Board did not have any discretion to disregard evidence submitted prior to the date to certify despite the Board's holding that the evidence was employer influenced. The Supreme Court of Canada reversed the Federal Court of Appeal in *Canadian Brotherhood of Railway, Transport and General Workers v. Victoria Flying Services and Canada Labour Relations Board* [1979] 1 S.C.R. 95.

253. *Re Canada Labour Relations Board and Transair Ltd. et al* [1977] 1 S.C.R. 722.

254. The question of whether a breach of the rules of natural justice is a jurisdictional error has never been clear. Certainly decisions like *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18, are strong indications that such a breach is a jurisdictional error.

255. *Northwestern Utilities Ltd. v. City of Edmonton* [1979] 1 S.C.R. 684. See also *Central Broadcasting Co. Ltd. v. Canada Labour Relations*

Board et al [1977] 2 S.C.R. 112, and *Canadian Brotherhood of Railway, Transport and General Workers v. Victoria Flying Services* [1979] 1 S.C.R. 95.

256. *Id.*, at 710.

257. S.C. 1977-78, c. 27.

258. *Supra*, note 248.

259. S.C. 1977-78, c. 27, s. 67; emphasis added.

260. *Supra*, note 250.

261. *Supra*, note 259, s. 45; emphasis added.

262. *Id.*, s. 43.

263. [1979] 1 F.C. 501. (T.D.)

264. *Id.*, at 15,035.

265. *Id.*, at 15,037.

266. The Federal Court has already recognized that these amendments are far-reaching and that ". . .the area in which the Board's decisions are open to attack and review has been narrowed by the amendments". *McKinlay Transport Ltd. v. Goodman et al.*, [1979] 1 F.C. 764 (T.D.).

267. *Supra*, note 238, at 64.

268. *Supra*, note 224, at 3.

269. See especially, Weiler, *The Slippery Slope of Judicial Intervention*, *supra*, note 226.

270. *Labour Code of British Columbia*, S.B.C. 1973 (2nd Sess.), c. 122 and amendments thereto.

271. Weiler, *The Administrative Tribunal: A View From the Inside*, *supra*, note 228, at 208.

272. *Id.*

273. Bureau of National Affairs Inc. (1977).

274. *Id.*, at 172.

275. *Supra*, note 224, at 3.

276. Jaffe, *Judicial Control of Administrative Action*, (1961) at 320.

277. Law Reform Commission of Canada, Working Paper 18, *Federal Court: Judicial Review*, at 39.

278. See *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police et al* [1979] 1 S.C.R. 311, (1978) 78 C.L.L.C. 14,181; *Downing v. Graydon, Kelley and Sage Promotions of Canada Limited* [1979] 21 O.R. (2d) 292, (1978) 78 C.L.L.C. 14,183 (Ont.C.A.).

279. The "rational basis" test is one used by the United States Courts in the area of judicial review of questions of law. There is nascent acceptance

to this approach in the dissenting judgment of Dickson, J. in *Jacmain v. Attorney General of Canada and Public Service Staff Relations Board* [1978] 2 S.C.R. 15,78 C.L.L.C. 14,117.

280. *Code*, s. 111(3)

281. *Id.*, s. 171.1.

282. R. Worth, "Bankers fear labor board power", *The Financial Post*, Feb. 18, 1978, at 14.

283. Letter from Marc Lapointe, Chairman of the Canada Labour Relations Board, to the editors of the *Financial Post*, printed in the July 15, 1978 issue of that newspaper, at 9.

284. Molot, "The Self-Created Rule of Policy and Administrative Discretion" (1976) 18 McGill L. Rev. 310.

285. 5 U.S.C. § § 1001-1011, passed in its original version in 1946.

286. K. C. Davis, *Administrative Law Text* (1972), at 139. For more complete analysis of the development of these procedures, see: Verkuil, "The Emerging Concept of Administrative Procedure" (1978) 78 Col. L. Rev. 258; Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1667; Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy", (1965) 78 Harv. L. Rev. 921; Fuchs, "Agency Development of Policy Through Rule-Making" (1965), 59 Nw. U.L. Rev. 781.

287. See, *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* [1947] 2 All E.R. 680 (C.A.).

288. See Davis, *Discretionary Justice* (1969). See *Senate Report of the Standing Committee on Regulations and Statutory Instruments* (1977).

289. See, *Labour Code of British Columbia*, S.B.C. 1973 (2nd Sess.) c.122, s. 27(2).

290. *Id.*, s. 27(3).

291. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* [1949] A.C. 134, at 149, (1948) 4 D.L.R. 673, at 680 per Lord Simonds.

292. *Code*, s. 118.

293. 13 di 13, [1976] 1 Can LRBR 361, 76 CLLC 16,018.

294. *Id.*, at 27, 366 and 16,491.

295. *Id.* These concerns were also present in earlier Canada Labour Relations Board decisions. See, *Syndicat National des Employés des Usines de Chemins de Fer v. Canadian Pacific Railway Company et al* (1967), 67 C.L.L.C. 16,001; *Syndicat Général du Cinéma et de la Télévision v. Canadian Broadcasting Corporation et al* (1966) 66 C.L.L.C. 16,081.

296. *Insurance Corporation of British Columbia — and — Canadian Union of Public Employees* [1974] 1 Can LRBR 403. The logic of the British Columbia approach has also been persuasive in other provinces. See, *Canadian Union of Public Employees, Local 488 and Central Investi-*

gation and Security Agency Limited [1978] 2 Can LRBR 201 (N.B.L.R.B.); *International Union of Operating Engineers, Local 827 and University of Manitoba and Canadian Association of Industrial, Mechanical and Allied Workers, Local 9* [1978] 2 Can LRBR 382 (Man.L.R.B.).

297. *Supra*, note 293, at 28, 366 and 16,492.

298. This was an alternative ground. The Board also held that the applicant did not have status as a trade union under the *Code*.

299. 20 di 319, [1977] 2 Can LRBR 99, 77 CLLC 16,089.

300. *Id.* at 346, 119 and 16,608.

301. *Id.* at 347, 120 and 608.

302. (1959) 59 CLLC 18,152.

303. *Supra*, note 299.

304. *Id.*, at 347-48, 120 and 609.

305. *Id.*, at 348-49, 121 and 609-10.

306. *Supra*, note 302.

307. *Supra*, note 299 at 349, 122 and 610.

308. *Woodward Stores (Vancouver) Ltd.* [1975] 1 Can LRBR 114, at 118, cited in *Trade of Locomotive Engineers, supra,* note 293, at 31, 368 and 493.

309. *Trade of Locomotive Engineers*, *supra*, note 293 at 32, 369 and 493-4.